TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 63

THOMAS W. WHITE, ET AL., FORMER COLLECTORS OF INTERNAL REVENUE FOR THE DISTRICT OF MASSACHUSETTS, PETITIONERS

vs.

WINCHESTER COUNTRY CLUB

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 29, 1941

CERTIORARI GRANTED MAY 26, 1941

SUPREME COURT OF THE UNITED STATES

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2 In United States District Court, District of Massachusetts

No. 7319, Law Docket

WINCHESTER COUNTRY CLUB, PLAINTIFF

v.

THOMAS W. WHITE, FORMER COLLECTOR OF INTERNAL REVENUE, DEFENDANT

Writ

[SEAL.] MASSACHUSETTS DISTRICT, *ss:*

The President of the United States of America, to the Marshal of our District of Massachusetts, or his Deputy, greeting:

We command you to attach the goods or estate of Thomas W. White, former Collector of Internal Revenue for the District of Massachusetts, of Newton, defendant, in our District of Massachusetts, to the value of Thirteen Thousand ($13,000) Dollars, and summon the said defendant (if he may be found in your district), to appear before our Judge of our District Court, next to be holden at Boston, within and for our said District of Massachusetts, on the 4th Tuesday of June, next, then and there, in our said Court, to answer unto Winchester Country Club, a corporation organized under the laws of the Commonwealth of Massachusetts and having its principal place of business at Winchester in said district, in an action of contract, to the damage of the said plaintiff (as it says) the sum of Thirteen thousand ($13,000) Dollars, which shall then and there be made to appear, with other due damages. And have you there this Writ, with your doings therein.

Witness, The Honorable Elisha H. Brewster, at Boston, the 20th day of May in the year of our Lord one thousand nine hundred and thirty-eight.

JAMES S. ALLEN,
Clerk.

By HELEN I. TWEEDY,
Deputy Clerk.

3 *Officer's return on writ*

BOSTON, *May 21, 1938.*

UNITED STATES OF AMERICA,
Massachusetts District, ss:

Pursuant hereunto I have this day attached chip as the property of the within named Thomas W. White and later on the same day I summoned the within named Thomas W. White to appear at Court and answer as herein directed by giving to him in hand at Newton in the said District an original summons to this writ.

JOHN J. MURPHY,
U. S. Marshal.
By DANIEL J. CHAPMAN,
Deputy.

The writ in this cause is dated May 20, 1938, and was duly entered at the June Term of this court, A. D. 1938, when and where the parties appeared by their respective attorneys.

At the entry of this cause, to wit, June 28, 1938, a declaration was filed. The declaration was subsequently amended and as amended is as follows:

In United States District Court

Declaration as amended

[Filed June 28, 1938; amended September 11, 1939]

The plaintiff, Winchester Country Club, for cause of actior against the defendant, Thomas W. White, former Collector of Internal Revenue for the District of Massachusetts, alleges:

1. That the plaintiff now is, and at all times hereinafter mentioned was, a corporation organized under the laws of the Commonwealth of Massachusetts, having its principal place of business in Winchester in said Commonwealth, and within the jurisdiction of this court.

4 2. That the defendant, Thomas W. White, at the time of the collection of the taxes sought to be recovered in this action, was Collector of Internal Revenue for the District of Massachusetts, and resides at Newton, in the Commonwealth of Massachusetts, and within the jurisdiction of this court.

3. That during the period from November 27, 1931, to July 26, 1933, the defendant, acting under the provisions of Section 501 of the Revenue Act of 1926, as amended by Section 413 (a) of the Revenue Act of 1928, assessed upon and collected from the plaintiff a tax of 10% of the amount paid by the members of the plaintiff for "dues or membership fees," and, purporting to act under said law, erroneously and illegally assessed upon and collected from the plaintiff a tax at the rate of 10% upon the amounts paid by said members for golf and tennis privileges. Said taxes were collected by plaintiff from its members at said rate of 10% upon the aggregate amounts paid by each respective member for dues and membership fees and for golf and tennis privileges, and this suit is brought under authority from, as agent for, and for the benefit of, the respective members (or the personal representatives of any deceased member) of the plaintiff from whom said taxes were collected, as more particularly hereinafter set forth.

4. That the amounts so erroneously and illegally assessed upon and collected from the plaintiff by the defendant as taxes on golf and tennis privileges, and the dates of such collection are as follows:

Nov. 29, 1931	$2,198.75	Nov. 28, 1932	$61.00
Dec. 29, 1931	416.50	Dec. 28, 1932	91.55
Jan. 19, 1932	135.50	Jan. 10, 1933	59.05
Feb. 24, 1932	47.00	Feb. 23, 1933	45.60
Mar. 22, 1932	15.00	Mar. 25, 1933	12.78
Apr. 27, 1932	980.85	Apr. 27, 1933	668.30
5 May 31, 1932	377.55	May 27, 1933	433.40
June 29, 1932	265.33	June 26, 1933	240.04
Aug. 2, 1932	153.80	July 26, 1933	168.15
Aug. 27, 1932	235.95		
Sept. 28, 1932	146.27	Total	6,846.72
Oct. 26, 1932	54.85		

5. That the members of the plaintiff from whom the plaintiff has collected the taxes referred to in the preceding paragraph and the amount of taxes so collected are set forth in Exhibit A, hereto attached and made a part hereof.

6. That the by-laws of the plaintiff, in force during the entire year 1931 and subsequent years, insofar as pertinent to this action, provided as follows:

ARTICLE IX

Dues, Privileges, and Fees

The annual dues of a member shall be $50. A member shall have all the privileges of the Club except golf.

Privileges:	Fees one year
Full privileges	$50
Limited privileges	35
6 Family privileges:	
1. Tennis—	
One person	10
Two persons	15
Three persons	20
Four or more persons	25
2. Limited privileges—	
One person	20
Two persons	30
Three persons	40
Four or more persons	50
3. Full privileges for son between 21 and 25 years of age	50

Limited privileges means unlimited house and tennis privileges and golf privileges except on Saturday afternoons, Sunday mornings, and holidays during April, May, June, September, October, and November. A member may have limited privileges on payment of the dues and prescribed fee. The number having limited privileges shall be determined by the Board of Directors

7. That the golf and tennis privileges during the said period were entirely optional with the plaintiff's members; that there was but one class of membership, and no separate class of golf membership or tennis membership.

8. That under the provisions of Section 501 of the Revenue Act of 1926, as amended by Section 413 (a) of the Revenue Act of 1928, the amounts paid by members of the plaintiff on account of golf and tennis privileges were not subject to tax, and the tax collected by the defendant from the plaintiff on said amounts was erroneously and illegally collected.

9. That within the time prescribed by law and pursuant to Article 54 of Treasury Regulations 43, the plaintiff, in
7 behalf of, and as agent for, its present or former members (or the personal representatives of any deceased member), on November 16, 1935, duly filed with the Commissioner of Internal Revenue a claim for refund in the amount of $9,211.25, alleging as a ground therefor that the amounts collected from its members

for golf and tennis privileges were not subject to tax under the provisions of Section 501 of the Revenue Act of 1926, as amended by Section 413 (a) of the Revenue Act of 1928; that attached to said claim for refund, in accordance with the provisions of said Article 54, were powers of attorney, in the form hereto attached, marked Exhibit B, and made a part thereof, from its present or former members (or the personal representatives of any member then deceased), authorizing the plaintiff to act in their behalf in filing said claim for refund, and in suing, either in its or their names, for the recovery thereof, and setting forth the amount of tax collected by the plaintiff from each of said members, on account of payments for golf and tennis privileges, and paid by plaintiff to the defendant, as hereinbefore set forth, or his successors in office, Joseph P. Carney, former Collector of Internal Revenue, and Thomas B. Hassett, former Acting Collector of Internal Revenue; that of the total amount of said claim for refund, $9,211.25, $6,846.72 was paid to the defendant as set forth in paragraph 4 hereof.

10. That by letter dated June 9, 1936, the Commissioner of Internal Revenue rejected said claim for refund in its entirety; that this suit is brought within two years from said date, in accordance with the provisions of Section 3226 of the Revised Statutes, as amended.

Wherefore, the plaintiff, as agent for and in behalf of and for the benefit of its present and former members as set forth in said Exhibit A (and the personal representatives of any deceased
8 member) prays judgment against the defendant in the amount of $6,846.72, with interest according to law, and for its costs.

By its attorney,

J. DUKE SMITH.

[Memorandum. Copy of Exhibit A, a list of names and amounts collected, attached to the original declaration and referred to in the foregoing declaration as annexed is here omitted, by agreement of parties. James S. Allen, Clerk.]

Exhibit B to declaration

POWER OF ATTORNEY

Know All Men by These Presents

That, I, *(Executor of will of formerly) *(Administrator of estate of formerly) *(formerly)

a member of Winchester Country Club, the subscriber hereof, do hereby constitute and appoint said Winchester Country Club or its

* Strike out descriptive words if now a member.

Treasurer for the time being, with full power of substitution in each of them, my true and lawful attorney irrevocably, for me and in my stead, in it or his name or mine, to file claim for refund of, collect, recover, sue and receipt for any and all amounts of Federal taxes upon any dues, privilege fees or other payments paid to or through said Winchester Country Club by me (

) as a member thereof, whether overpaid or erroneously or illegally collected under Section 501 of the Revenue Act of 1926 as amended by Section 413 (a) of the Revenue Acts of 1928, or any other Act or Acts, and to which I am or may become entitled, hereby granting to my said attorney full power to execute in my name and behalf any and all papers and documents necessary or expedient in connection with the matters mentioned above, and otherwise act in and concerning the premises as fully and effectually as I might act if personally present.

This power shall remain in full force and effect until full collection of said refund is made and no revocation hereof will be effective until the Commissioner of Internal Revenue has actually received notice of such revocation.

Witness my hand this day of A. D. 1938.

Signed in the presence of Two Witnesses

COMMONWEALTH OF MASSACHUSETTS.

---, ss. --- *1938.*

Then personally appeared --- and acknowledged the foregoing instrument to be his free act and deed.

Before me.

Attach Notarial Seal

Notary Public.

Instructions

The foregoing power must be witnessed by two witnesses and acknowledged before a Notary Public who must attach his Notarial Seal. Otherwise this power will not be accepted by Federal Officials.

In United States District Court

Answer

Filed July 19, 1938

Now comes the defendant in the above-entitled action and for his answer to the declaration on file herein, denies each and every material allegation, item, count and particular in said declaration contained.

By his Attorney,

JOHN A. CANAVAN,
Acting United States Attorney,
By GEORGE F. GARRITY,
Assistant United States Attorney.

This cause was thence continued from term to term to the December Term, A. D. 1938, when, to wit, December 14, 1938, it was ordered by the court, the Honorable George C. Sweeney, District Judge, sitting, that the law cases numbered 7319, 7320, and 7321 be consolidated.

On the said 14th day of December, said cause was set down for pre-trial, the Honorable George C. Sweeney, District Judge as aforesaid, sitting, and the following Pre-Trial Order was entered, jury being waived in open court, stipulation of facts to be filed:

In United States District Court

No. 7319, Law
WINCHESTER COUNTRY CLUB
v.
THOMAS W. WHITE, FORMER COLLECTOR

No. 7320, Law
WINCHESTER COUNTRY CLUB
v.
JOSEPH P. CARNEY, FORMER COLLECTOR

No. 7321, Law
WINCHESTER COUNTRY CLUB
v.
THOMAS B. HASSETT, FORMER COLLECTOR

Pre-trial order

December 14, 1938

At a pre-trial hearing of the above-entitled action, the parties being present in court, or represented by counsel, made the following stipulations and admissions:

These are hereby consolidated for trial.

Counsel are preparing a stipulation that is to be filed admitting all possible pertinent facts.

11 The sole question in the case is the taxability of golfing and tennis privileges afforded by the club as distinct from its dues and membership fees.

Both counsel in open court waive jury trial.

Case to go to the Jury Waive List.

It is ordered that the subsequent course of the action be controlled by the foregoing, unless modified at the trial thereof to prevent manifest injustice.

GEO. C. SWEENEY.
United States District Judge.

Entered 12 14, 1938.

In United States District Court

Agreed statement of facts

Filed March 3, 1939

It is hereby stipulated and agreed by and between the parties hereto by their respective attorneys that the following facts may be taken as true, subject to objection as to materiality, provided, that this stipulation shall not affect the right of either party to introduce other and further evidence not inconsistent with the facts herein stipulated to be taken as true.

I. The plaintiff now is, and at all times hereinafter mentioned was, a corporation organized under the laws of the Commonwealth of Massachusetts, having its principal place of business in Winchester, in said Commonwealth, and within the jurisdiction of this court.

II. The defendant, Thomas W. White, at the time of the collection of the taxes sought to be recovered in this action, was Collector of Internal Revenue for the District of Massa-

12 chusetts, and resides at Newton, in the Commonwealth of Massachusetts, and within the jurisdiction of this court.

III. During the period from November 27, 1931 to July 26, 1933, there was assessed against the plaintiff $12,210.58, under the provisions of Section 501 of the Revenue Act of 1926, as amended by Section 413 (a) of the Revenue Act of 1928, and collected from the plaintiff by the defendant. This amount was computed at the rate of 10% on the following items: dues or membership fees $5,363.86; and golf and tennis privileges $6,846.72. Said taxes were collected by the plaintiff from its members at the rate of 10% upon the aggregate amounts paid

by each respective member for dues or membership fees and for golf and tennis privileges.

The said amounts assessed against the plaintiff and collected from it by the defendant as taxes with respect to golf and tennis privileges, and the dates of such collections are as follows:

Nov. 27, 1931	$2,198.75		Nov. 28, 1932		$61.00
Dec. 29, 1931	416.50		Dec. 28, 1932		91.55
Jan. 19, 1932	135.50		Jan. 10, 1933		59.05
Feb. 24, 1932	47.00		Feb. 23, 1933		45.60
Mar. 22, 1932	15.00		Mar. 26, 1933		12.78
Apr. 27, 1932	980.35		Mar. 25, 1933		12.78
May 31, 1932	377.55	13	Apr. 25, 1933		608.30
June 29, 1932	265.33		May 27, 1933		433.40
Aug. 2, 1932	153.80	June	26, 1933		240.04
Aug. 27, 1932	235.95	July	26, 1933		168.15
Sept. 28, 1932	146.27				
Oct. 26, 1932	94.85		Total		6,846.72

IV. The members of the plaintiff from whom the defendant has collected said taxes referred to in paragraph III hereof, and the amount of taxes so collected, are set forth in Exhibit A, attached to the declaration, and by reference made a part hereof.

V. Within the time prescribed by law and pursuant to Article 54 of Treasury Regulations 43, the plaintiff, in behalf of, and as agent for, its present or former members (or the personal representatives of any deceased member), on November 16, 1935, duly filed with the Commissioner of Internal Revenue a claim for refund in the amount of $9,211.25, alleging as a ground therefor that the amounts collected from its members for golf and tennis privileges were not subject to tax under the provisions of Section 501 of the Revenue Act of 1926, as amended by Section 413 (a) of the Revenue Act of 1928. Attached to said claim for refund, in accordance with the provisions of said Article 54, were powers of attorney, duly verified, in the form attached to the declaration and marked Exhibit B, and by reference made a part hereof, from its present or former members (or the personal representatives of any member then deceased), authorizing the plaintiff to act in their behalf in filing said claim for refund, and in suing, either in its or their names, for the recovery thereof, and setting forth the amount of tax collected by the plaintiff from each of said members, on account of payments for golf and tennis privileges, and paid by the plaintiff to the
14 defendant, as hereinbefore set forth, or to his successors Joseph P. Carney, Collector of Internal Revenue, or to Thomas B. Hassett, former Acting Collector of Internal Revenue. Of the total amount of said claim for refund, $6,846.72 was paid to the defendant as set forth in paragraph III hereof.

VI. By letter dated June 9, 1936, the Commissioner of Internal Revenue notified the plaintiff that its claim for refund was rejected in full, and this suit was brought within two years from said date, in accordance with the provisions of Section 3226 of the Revised Statutes, as amended.

J. DUKE SMITH,
Attorney for plaintiff.
JOHN A. CANAVAN,
United States Atty.
By C. KEEFE HURLEY,
Assistant United States Attorney,
Attorney for Defendant.

In United States District Court

Waiver of jury trial.

Filed March 3, 1939

It is hereby agreed by the parties hereto that trial by jury is waived.

J. DUKE SMITH,
Attorney for Plaintiff.
JOHN A. CANAVAN,
United States Atty.
By C. KEEFE HURLEY,
Assistant United States Attorney,
Attorneys for Defendant.

15 In United States District Court

Supplemental agreed statement of facts

Filed September 12, 1939

It is hereby stipulated and agreed by and between the parties hereto by their respective attorneys that the following facts may be taken as true, subject to objection as to materiality, provided, that this stipulation shall not affect the right of either party to introduce other and further evidence not inconsistent with the facts herein stipulated to be taken as true.

Attached hereto, and made a part hereof, and marked Exhibit A, is a booklet entitled "Winchester Country Club Winchester, Mass. By-Laws, Club Rules, Officers, Committees 1929," containing a copy of the plaintiff's By-Laws, as authorized by the plaintiff, and in force during the period covered by this suit, with the

exception that on April 18, 1932, the number of members having full privileges was increased from 425 to 475.

The said By-Laws as amended and set forth in said booklet were authorized at an annual meeting of the plaintiff on January 29, 1929. Attached hereto, and made a part hereof, and marked Exhibit B are excerpts from the By-Laws in force immediately prior to the annual meeting of January 29, 1929.

Of the amount of $6,846.72 referred to in paragraph III of the agreed statement of facts, the sum of $5,470.12 was paid with respect to Full Privileges and Limited Privileges; the sum of $1,319.20 was paid with respect to Family Limited Privileges;
the sum of $19.00 was paid with respect to Full Privileges
16 for sons between 21 and 25 years of age; the sum of $38.40
was paid with respect to Family Tennis Privileges; said Privileges being those provided for by Article IX of the By-Laws.

J. DUKE SMITH,
Attorney for Plaintiff.
EDMUND J. BRANDON,
United States Attorney.
By C. KEEFE HURLEY,
Ass't U. S. Attorney,
Attorney for Defendant.

Exhibit A

[Memorandum. Copy of booklet, entitled "Winchester Country Club By-Laws, Club Rules, etc." referred to in the foregoing Supplemental Agreed Statement of Facts as annexed, is here omitted, the original being transmitted as an original. James S. Allen, Clerk.]

Exhibit B to supplemental agreed statement of facts

ARTICLE VII

Members and Their Election

The number of members of the Corporation shall be fixed from time to time by the Board of Directors, but shall not exceed (four) hundred and twenty-five having golf privileges.

ARTICLE VIII

Initiation Fees

The initiation fee for members shall be ($100) and for special members ($25).

ARTICLE IX

Dues and Assessments

The annual dues shall be as follows:
Class A. Membership, including golf and tennis privileges, $75.
17 Class B. Membership, including tennis, but not including golf privileges, $40.
Special Membership, $40.

Associate Membership Dues

1. First Associate Membership under Class A, including golf and tennis privileges, $20. Second and Third Associate Memberships, $10 each.
2. First Associate Membership under Class B, including golf and tennis privileges, $35 for the first, and for additional associate memberships, $15 each. For tennis privileges alone, $10 for the first associate, $5 for the second and third.

Family Memberships

Family Memberships, Sections 1 and 2 of four or more persons, under Class A, $115; under Class B, $100. Under Class B, with tennis privileges only $60.

Recital as to hearing

Also on said 12th day of September A. D. 1939, said cause comes on for trial and is fully heard by the court on pleadings, agreed statement of facts, supplemental agreed statement of facts, and evidence, the Honorable Hugh D. McLellan, District Judge, sitting.

In United States District Court

Plaintiff's amended requests for findings of fact

Presented September 12, 1939

Now comes the plaintiff in the above entitled action and requests the court to make the following findings of fact.
18 1. The plaintiff during the period November 27, 1931, to July 26, 1933, inclusive, paid to the defendant the sum of $6,846.72, representing a tax of 10% on amounts collected by the plaintiff from its members on account of golf and tennis privileges.
2. Said amount was assessed against the plaintiff, together with the amount of $5,363.86, representing a tax of 10% on amounts

collected by the plaintiff from its members on account of dues or membership fees and paid to the defendant.

3. On November 16, 1938, the plaintiff on behalf of and as agent for its present or former members, or the personal representatives of any deceased member, pursuant to the provisions of Article 54 of Regulations 43, duly filed with the Commissioner of Internal Revenue a claim for refund in the amount of $9,211.25. Included in said amount were payments made to Joseph P. Carney, former Collector of Internal Revenue, and to Thomas B. Hassett, former Acting Collector of Internal Revenue.

4. By letter, dated June 9, 1936, the Commissioner of Internal Revenue notified the plaintiff that its claim for refund was rejected in full.

5. This suit was brought within two years from said date, pursuant to the provisions of Sec. 3226 of the Revised Statutes, as amended.

6. The plaintiff had but one class of membership, with the exception of a small class of Special Members.

7. Golf and/or tennis privileges were optional with members, and under the by-laws and under the policy of the plaintiff could be acquired informally at any time.

8. Under the by-laws and the policy of the plaintiff there was no liability of the plaintiff's members, once they had acquired golf and/or tennis privileges, to pay for them for a succeeding year, if they did not surrender such privileges prior to the close of the plaintiff's fiscal year.

19 9. No formal action with respect to surrendering golf and/or tennis privileges was required by the by-laws of the plaintiff or under its general policy.

10. Fees paid for golf and/or tennis privileges were not fixed and definite charges applicable to all members of any particular class of membership.

By its attorney,

J. DUKE SMITH.

In United States District Court

Plaintiff's requests for conclusions of law

Presented September 12, 1939

Now comes the plaintiff in the above entitled action and requests the court to make the following conclusions of law.

1. The members of the plaintiff club, by paying fees for the privilege of playing golf, did not constitute a separate or particular class of members.

2. The fees paid by members of the plaintiff club for the privilege of playing golf did not constitute a fixed recurring liability.

3. The fees paid by members of the plaintiff club for the privilege of playing golf did not arise out of and were not incidental to any particular class of membership, but were optional on the part of all members.

4. The members of the plaintiff club, by paying fees for the privilege of playing golf or tennis by members of their families, did not constitute a separate or particular class of members.

5. The fees paid by members of the plaintiff club for the privilege of playing golf or tennis by members of their families, did not constitute a fixed recurring liability.

20 6. The fees paid by members of the plaintiff club, for the privilege of playing golf or tennis by members of their families, did not arise out of and were not incidental to any particular class of membership, but were optional on the part of all members.

7. The fees paid by members of the plaintiff club for the privilege of playing golf, and the fees paid by members for golf and tennis privileges for members of their families, were not dues or membership fees within the meaning of Section 501 of the Revenue Act of 1926, as amended by Section 413 of the Revenue Act of 1928.

By its attorney,

J. DUKE SMITH.

In United States District Court

No. 7319

WINCHESTER COUNTRY CLUB, PLAINTIFF

v.

THOMAS W. WHITE, FORMER COLLECTOR OF INTERNAL REVENUE, DEFENDANT

No. 7320

WINCHESTER COUNTRY CLUB, PLAINTIFF

v.

JOSEPH P. CARNEY, FORMER COLLECTOR OF INTERNAL REVENUE, DEFENDANT

No. 7321

WINCHESTER COUNTRY CLUB, PLAINTIFF

v.

THOMAS B. HASSETT, ACTING COLLECTOR OF INTERNAL REVENUE, DEFENDANT

Defendants' requests for findings of fact and conclusions of law

Presented September 12, 1939

Now come the defendants, by their Attorney, Edmund J. Brandon, United States Attorney for the District of Massachusetts, and respectfully move the Court to make and enter the following Findings of Fact and thereon to make and enter the following Conclusions of Law:

FINDINGS OF FACT

I. The plaintiff now is, and at all times hereinafter mentioned was, a corporation organized under the laws of the
21 Commonwealth of Massachusetts, having its principal place of business at Winchester, in said Commonwealth, and within the jurisdiction of this Court.

II. The defendants, Thomas W. White, Joseph P. Carney, and Thomas B. Hassett, were Collectors of Internal Revenue for the District of Massachusetts, and, each in said capacity, collected the taxes, as hereinafter indicated, which are sought to be recovered. Said defendants reside within the jurisdiction of this Court.

III. During the period from November 27, 1931, to July 26, 1933, there was assessed against the plaintiff $12,210.58 under the provisions of Section 501 of the Revenue Act of 1926 as amended by Section 413(a) of the Revenue Act of 1928, and collected from the plaintiff by the defendant, Thomas W. White. During the period from September 7, 1933, to October 23, 1934, there was assessed against the plaintiff $5,735.47 under the provisions of Section 501 of the Revenue Act of 1926 as amended by Section 413(a) of the Revenue Act of 1928, and collected from the plaintiff by the defendant, Joseph P. Carney. During the period from November 28, 1934, to January 9, 1935, there was assessed against the plaintiff $609.58 under the provisions of Section 501 of the Revenue Act of 1926 as amended by Section 413(a) of the Revenue Act of 1928, and collected from the plaintiff by the defendant, Thomas B. Hassett. (See Paragraph III of the Agreed Statements of Facts.)

IV. Of the total of $18,555.63 paid to the defendants the sum of $9,344.38 was admittedly properly levied upon dues or membership fees. The balance of $9,211.25, which these suits seek to recover, was levied because of certain payments to the club for so-called "privileges," which are described in detail hereinafter. (See Paragraphs III of Agreed Statements of Facts and last paragraph of Supplemental Agreed Statements of Facts.)

22 V. Exhibit A attached to the Supplemental Agreed Statements of Facts contains a true copy of the By-Laws of the Winchester Country Club authorized at an annual meeting of the plaintiff on January 29, 1929, and in force during the period covered by these suits, with the exception that the number of members having Full Privileges was increased from 425 to 475. Pertinent excerpts from these By-Laws are the following:

ARTICLE VII

Members and Their Election

The number of members of the Corporation shall be fixed from time to time by the Board of Directors, but shall not exceed four hundred and twenty-five [later 475] having full privileges.

ARTICLE VIII

Initiation Fees

The initiation fee for members shall be $100 and for special members $25.

ARTICLE IX

Dues, Privileges and Fees

The annual dues of a member shall be $50. A member shall have all the privileges of the Club except golf.

Privileges:	Fees one year
Full Privileges	$50
Limited Privileges	35
Family Privileges:	
1. Tennis—	
One Person	10
Two Persons	15
Three Persons	20
Four or more Persons	25
23 2. Limited Privileges—	
One Person	20
Two Persons	30
Three Persons	40
Four or more Persons	50
3. Full Privileges for son between 21 and 25 years of age	50

Full privileges means all the privileges of the Club. A member may have full privileges on payment of the dues and prescribed fee.

Limited privileges means unlimited house and tennis privileges and golf privileges except on Saturday afternoons, Sunday mornings, and holidays during April, May, June, September, October, and November. A member may have limited privileges on payment of the dues and prescribed fee. The number having limited privileges shall be determined by the Board of Directors.

A member may have for one or more of his immediate family tennis privileges by payment of the dues and prescribed fee.

A member who himself has either full privileges or limited privileges may have for one or more of his immediate family limited privileges by payment of the dues and prescribed fee.

A member who has neither full nor limited privileges may have for one or more of his immediate family limited privileges upon payment of Thirty ($30) Dollars in addition to the dues and prescribed fee.

Immediate family means the mother, wife, children, brother, or sister of a member who resides with such member, but not including a married son or daughter nor a man over twenty-five (25) years of age.

A lady not eligible to family privileges may become a spe-
24 cial member of the Club with limited privileges upon election by the Board of Directors, but shall have no interest in the property of the Club. Her annual dues shall be $50. A special member may not have family privileges for others.

Dues and fees shall be payable on March 1st of each year, provided that payment of one-half of the dues and fees may be deferred until July 1st. A member whose dues and fees or either of them, remain unpaid for sixty (60) days after they are payable, shall be posted in the Club House; and if payment be not made within thirty (30) days thereafter, the member may at the discretion of the Board of Directors be dropped from membership.

An extra assessment at the discretion of the Board of Directors on each member may be levied if found necessary for interest on the mortgages or other obligations of the Corporation.

The Board of Directors may deny the privileges to any person.

A person having a family limited privilege who shall be elected to membership, at the discretion of the Directors, may not be required to pay an initiation fee.

The Club year shall be from January 1st to December 31st.

Any member elected after August 1st shall pay one-half of the annual dues and fees.

Any member disobeying any rule of the Club may be suspended from all privileges of the Club or may be expelled from the Club by the Board of Directors.

The names of all members failing to pay assessments and indebtedness to the Club, in excess of $10 other than annual dues and fees, before the twentieth of the month following the date such debt is incurred, shall be posted in the Club House. If payment be not made within twenty days thereafter, the credit of such member shall be stopped, and all privileges of the Club denied him; and the member may, at the discretion of the Board of Directors, be dropped from the Club list.

VI. The Special Members referred to in said By-Laws above were subject to the further restriction that they were not permitted to use the golf course on Open Tournament Days, Saturday afternoons between one and six o'clock, Sundays, and holidays until after one o'clock. (See Golf Rules No. 10.)

VII. The provisions in the By-Laws permitting Limited Privileges to be acquired by a member's family operate as follows: a member who has neither Full nor Limited Privileges may acquire Limited Privileges for his wife upon the payment of $30, and for his wife and one other member of his family upon the payment of $45. A member who has either Full or Limited Privileges may acquire Limited Privileges for his wife upon the payment of $20, and for his wife and one other member of his family upon the payment of $30.

VIII. Pertinent excerpts from the By-Laws of the Winchester Country Club in force immediately prior to the annual meeting of January 29, 1929, are the following:

ARTICLE VII

Members and Their Election

The number of members of the Corporation shall be fixed from time to time by the Board of Directors, but shall not exceed (four) hundred and twenty-five having golf privileges.

ARTICLE VIII

Initiation Fees

The initiation fee for members shall be ($100) and for special members ($25.).

26 ARTICLE IX

Dues and Assessments

The annual dues shall be as follows:

Class A. Membership, including golf and tennis privileges, $75.

Class B. Membership, including tennis but not including golf privileges, $40.

Special Membership, $40.

Associate Membership Dues

1. First Associate Membership under Cla A, including golf and tennis privileges, $35 for the first, and for additional associate berships, $10 each.

2. First Associate Membership under Class B, including golf and tennis privileges, $35 for the first, and for additional associate memberships, $15 each. For tennis privileges alone, $10 for the first associate, $5 for the second and third.

Family Memberships

Family Memberships, Sections 1 and 2 or four of more persons, under Class A, $115; under Class B, $100. Under Class B, with tennis privileges only $60.

(See Exhibit B of Supplemental Agreed Statements of Facts.)

IX. Of the amount of $9,211.25 referred to in Finding IV the sum of $7,432.25 was paid with respect to Full Privileges and Limited Privileges; the sum of $1,697 was paid with respect to Family Limited Privileges; the sum of $29 was paid with respect to Full Privileges for sons between 21 and 25 years of age; the sum of $53 was paid with respect to Family Tennis Privileges; said Privileges being those provided for by Article IX of the By-Laws of the Winchester Country Club. (The
27 above amounts are the consolidated totals of the amounts referred to in the last paragraph of the Supplemental Agreed Statements of Facts.)

X. On the $9,211.25 referred to in Finding IV the sum of $6,846.72 was received by the defendant, Thomas W. White; $2,259.73 by the defendant, Joseph P. Carney; and $104.80 by the

defendant, Thomas B. Hassett, on the following dates and in the following amounts:

Nov. 27, 1931	$2,198.75	Sept. 7, 1933	$155.05
Dec. 29, 1931	416.50	Sept. 26, 1933	132.90
Jan. 19, 1932	135.50	Oct. 24, 1933	99.68
Feb. 24, 1932	47.00	Nov. 27, 1933	67.20
Mar. 22, 1932	15.00	28 Dec. 21, 1933	64.45
Apr. 27, 1932	980.35	Jan. 17, 1933	82.10
May 31, 1932	377.55	Feb. 26, 1934	36.70
June 29, 1932	265.33	Mar. 29, 1934	24.75
Aug. 2, 1932	153.80	Apr. 25, 1934	637.35
Aug. 27, 1932	235.95	May 23, 1934	363.55
Sept. 28, 1932	146.27	June 28, 1934	151.20
Oct. 26, 1932	94.85	July 28, 1934	109.00
Nov. 28, 1932	61.00	Aug. 25, 1934	211.80
Dec. 28, 1932	91.55	Sept. 22, 1934	82.50
Jan. 19, 1933	59.05	Oct. 23, 1934	47.50
Feb. 23, 1933	45.60	Total	2,250.73
Mar. 25, 1933	12.78	Nov. 28, 1934	38.60
Apr. 25, 1933	668.30	Dec. 21, 1934	29.05
May 27, 1933	433.40	Jan. 9 1935	37.15
June 26, 1933	240.04	Total	104.80
July 28, 1933	168.15		
Total	6,846.72		

(See Paragraph III of the Agreed Statements of Facts.)

XI. The plaintiff collected the above taxes of $9,211.25 from its members in proportion to each month's payments for "Dues and Privileges" under Article IX of the By-Laws. (See Paragraphs IV and V of the Agreed Statements of Facts.)

XII. On November 16, 1935, the plaintiff, on behalf of and as agent for its present or former members, or the personal representatives of any deceased member, pursuant to the provisions of Article 54 of Regulations 43, duly filed with the Commissioner of Internal Revenue a claim for refund in the amount of $9,211.25. Included in said amount were the payments made to the defendants as indicated in Finding X.

XIII. By letter dated June 9, 1936, the Commissioner of Internal Revenue notified the plaintiff that its claim for
29 refund was rejected in full, and this suit was brought within two years from said date.

XIV. The amounts paid to the Winchester Country Club for Full Privileges provided for by Article IX of the By-Laws were charges applicable to a particular class of membership.

XV. The amounts paid to the Winchester Country Club for Limited Privileges pursuant to Article IX of the By-Laws were charges applicable to a particular class of membership.

XVI. The amounts paid to the Winchester Country Club for Family Privileges pursuant to Article IX of the By-Laws were charges applicable to a particular class of membership.

XVII. The amounts paid to the Winchester Country Club pursuant to the provisions of Article IX of the By-Laws were charges applicable to various classes of membership.

CONCLUSIONS OF LAW

I. The taxes which are sought to be recovered by the plaintiff were lawfully assessed and paid pursuant to Section 501 of the Revenue Act of 1926 as amended by Section 413 (a) of the Revenue Act of 1928.

II. The amounts paid to the Winchester Country Club pursuant to Article IX of the By-Laws were dues or membership fees of various classes of membership within the meaning of Section 501 of the Revenue Act of 1926 as amended by Section 413 (a) of the Revenue Act of 1928.

III. The plaintiff is not entitled to any recovery.

IV. Judgment should be entered for the defendants, together with costs.

EDMUND J. BRANDON,
United States Attorney.
By C. KEEFE HURLEY,
Assistant United States Attorney.

30 In United States District Court

Defendant's Motion for Judgment

Filed September 12, 1939

Now comes the United States of America, defendant in the above-entitled action, and moves that judgment be entered in its favor on the pleadings and evidence submitted, together with costs.

EDMUND J. BRANDON,
United States Attorney.
By C. KEEFE HURLEY,
Assistant United States Attorney.

In United States District Court

Plaintiff's motion for judgment

Filed September 12, 1939

Now comes the plaintiff in the above entitled action and moves that on pleadings and the evidence judgment be entered for the plaintiff.

By its attorney,

J. DUKE SMITH.

Said cause is thence taken under advisement and on the 27th day of October, A. D. 1939, an opinion of the court is announced and certain findings of fact and conclusions of law are made, the defendant's motion for judgment being denied, plaintiff to be entitled to judgment for the respective amounts found to have been paid and interest thereon.

31 In United States District Court

Judgment

October 27, 1939

McLellan, J. In accordance with the opinion of the court handed down this day, it is ordered Judgment for the plaintiff in the sum of six thousand eight hundred and forty six dollars and seventy two cents ($6,846.72), with interest according to law, and for its costs taxed at $.

By the Court:

Edith G. Rollins,
Deputy Clerk.

In United States District Court, District of Massachusetts

No. 7320, Law Docket

Winchester Country Club, plaintiff
v.
Joseph P. Carney, Former Collector of Internal Revenue, defendant

Writ

[seal] Massachusetts District, ss:

The President of the United States of America, to the Marshal of our District of Massachusetts, or his Deputy, Greeting:

We command you to attach the goods or estate of Joseph P. Carney, former collector of Internal Revenue for the District of Massachusetts, of Boston, defendant, in our District of Massachusetts, to the value of Five Thousand ($5,000) Dollars, and summon the said Defendant (if he may be found in your
32 district), to appear before our Judge of our District Court, next to be holden at Boston, within and for our said District of Massachusetts, on the 4th Tuesday of June, next Then and there, in our said Court, to answer unto Winchester Country Club, a corporation organized under the laws of the Commonwealth of Massachusetts and having its principal place

of business at Winchester in said district In an action of contract To the damage of said plaintiff (as it says) the sum of Five Thousand ($5,000) Dollars, which shall then and there be made to appear, with other due damages. And have you there this Writ, with your doings therein.

Witness, The Honorable Elisha H. Brewster, at Boston, the 20th day of May in the year of our Lord one thousand nine hundred and thirty-eight.

JAMES S. ALLEN,
Clerk,
By HELEN I. TWEEDY,
Deputy Clerk.

Officer's return on writ

BOSTON, *May 23, 1938.*

UNITED STATES OF AMERICA,
Massachusetts District, ss:

Pursuant hereunto I have this day attached a chip as the property of the within named Joseph P. Carney and later on the same day I summoned the within named Joseph P. Carney to appear at Court and answer as herein directed by giving to him in hand at Boston in the said District an original summons to this writ.

JOHN J. MURPHY,
U. S. Marshal,
By DANIEL J. CHAPMAN,
Deputy.

The writ in this cause is dated May 20, 1938, and was duly entered at the June Term of this court, A. D. 1938, when
33 and where the parties appeared by their respective attorneys.

In United States District Court

Declaration

Filed June 28, 1938

The plaintiff, Winchester Country Club, for cause of action against the defendant, Joseph P. Carney, former Collector of Internal Revenue for the District of Massachusetts, alleges:

1. That the plaintiff now is, and at all times hereinafter mentioned was, a corporation organized under the laws of the Commonwealth of Massachusetts, having its principal place of business in Winchester in said Commonwealth, and within the jurisdiction of this court.

2. That the defendant, Joseph P. Carney, at the time of the collection of the taxes sought to be recovered in this action, was Collector of Internal Revenue for the District of Massachusetts, and resides at Boston, in the Commonwealth of Massachusetts, and within the jurisdiction of this court.

3. That during the period from September 7, 1933, to October 23, 1934, the defendant, acting under the provisions of Section 501 of the Revenue Act of 1926, as amended by Section 413 (a) of the Revenue Act of 1928, assessed upon and collected from the plaintiff a tax of 10% of the amount paid by the members of the plaintiff for "dues or memberships fees," and, purporting to act under said law, erroneously and illegally assessed upon and collected from the plaintiff a tax at the rate of 10% upon the amounts paid by said members for golf and tennis privileges. Said taxes were collected by plaintiff from its members at said rate of 10% upon the aggregate amounts paid by each respective member for dues and membership fees and for golf and tennis privileges,
34 and this suit is brought under authority from, as agent for, and for the benefit of, the respective members (or the personal representatives of any deceased member) of the plaintiff from whom said taxes were collected, as more particularly hereinafter set forth.

4. That the amounts so erroneously and illegally assessed upon and collected from the plaintiff by the defendant as taxes on golf and tennis privileges, and the dates of such collection are as follows:

Sept.	7, 1933	$155.05	May	23, 1934	$363.55
Sept.	26, 1933	132.90	June	28, 1934	151.20
Oct.	24, 1933	99.68	July	28, 1934	109.00
Nov.	27, 1933	67.20	Aug.	25, 1934	211.80
Dec.	21, 1933	64.45	Sept.	22, 1934	82.50
Jan.	17, 1934	82.10	Oct.	23, 1934	47.50
Feb.	26, 1934	30.70			
Mar.	29, 1934	24.75		Total	2,259.73
Apr.	25, 1934	687.35			

5. That the members of the plaintiff from whom the plaintiff has collected the taxes referred to in the preceding paragraph and the amount of taxes so collected are set forth in Exhibit A, hereto attached and made a part hereof.

6. That the by-laws of the plaintiff, in force during the entire years 1933 and 1934, insofar as pertinent to this action, provided as follows:

35 ARTICLE IX

Dues, Privileges, and Fees

The annual dues of a member shall be $50. A member shall have all the privileges of the Club except golf.

Privileges:	Fees one year
Full privileges	$50
Limited privileges	35
Family privileges:	
1. Tennis—	
One person	10
Two persons	15
Three persons	20
Four or more persons	25
2. Limited privileges—	
One person	20
Two persons	30
Three persons	40
Four or more persons	50
3. Full privileges for son between 21 and 25 years of age	50

Limited privileges means unlimited house and tennis privileges and golf privileges except on Saturday afternoons, Sunday mornings, and holidays during April, May, June, September, October, and November. A member may have limited privileges on payment of the dues and prescribed fee. The number having limited privileges shall be determined by the Board of Directors.

7. That the golf and tennis privileges during the said period were entirely optional with the plaintiff's members; that there was but one class of membership, and no separate class of golf membership or tennis membership.

36 8. That under the provisions of Section 501 of the Revenue Act of 1926, as amended by Section 413 (a) of the Revenue Act of 1928, the amounts paid by members of the plaintiff on account of golf and tennis privileges were not subject to tax, and the tax collected by the defendant from the plaintiff on said amounts was erroneously and illegally collected.

9. That within the time prescribed by law and pursuant to Article 54 of Treasury Regulations 43, the plaintiff, in behalf of, and as agent for, its present or former members (or the personal representatives of any deceased member), on November 16, 1935, duly filed with the Commissioner of Internal Revenue a claim for refund in the amount of $9,211.25, alleging as a ground therefor that the amounts collected from its members for golf and tennis privileges were not subject to tax under the provisions of Section 501 of the Revenue Act of 1926, as amended by Section 413 (a) of the Revenue Act of 1928; that attached to said claim for refund, in accordance with the provisions of said Article 54 were powers of attorney, in the form hereto attached,

marked Exhibit B, and made a part hereof, from its present or former members (or the personal representatives of any member then deceased), authorizing the plaintiff to act in their behalf in filing said claim for refund, and in suing, either in its or their names, for the recovery thereof, and setting forth the amount of tax collected by the plaintiff from each of said members, on account of payments for golf and tennis privileges, and paid by plaintiff to the defendant, as hereinbefore set forth, or to Thomas W. White, former Collector of Internal Revenue, or Thomas B. Hassett, former Acting Collector of Internal Revenue; that of the total amount of said claim for refund, $9,211.25, $2,259.73 was paid to the defendant as set forth in paragraph 4 hereof.

37 10. That by letter dated June 9, 1936, the Commissioner of Internal Revenue rejected said claim for refund in its entirety; that this suit is brought within two years from said date, in accordance with the provisions of Section 3226 of the Revised Statutes, as amended.

Wherefore, the plaintiff, as agent for and in behalf of and for the benefit of its present and former members as set forth in said Exhibit A (and the personal representatives of any deceased member) prays judgment against the defendant in the amount of $2,259.73, with interest according to law, and for its costs.

By its attorney,

J. DUKE SMITH.

[Memorandum. By consent of parties, Exhibit "A," list of names and amounts collected, and Exhibit "B," form of power of attorney, attached to the original declaration, are here omitted. James S. Allen, Clerk.]

In United States District Court

Answer

Filed July 19, 1938

Now comes the defendant in the above-entitled action and for his answer to the declaration on file herein, denies each and every material allegation, item, count, and particular in said declaration contained.

By his Attorney,

JOHN A. CANAVAN,
Acting United States Attorney,
By GEORGE F. GARRITY,
Assistant United States Attorney.

38 This cause was thence continued from term to term to the December Term, A. D. 1938, when, to wit, December 14, 1938, it was ordered by the court, the Honorable George C. Sweeney, District Judge, sitting, that the law cases numbered 7319, 7320, and 7321 be consolidated.

On the said 14th day of December, said cause was set down for pre-trial, the Honorable George C. Sweeney, District Judge, as aforesaid, sitting, and the following Pre-Trial Order was entered, jury being waived in open court, stipulation of facts to be filed:

In United States District Court

Pre-trial order

December 14, 1938

[Memorandum. Pre-trial order will be found printed in case No. 7319, Law, on page 10 of this volume. James S. Allen, Clerk.]

In United States District Court

Agreed statement of facts

Filed March 3, 1939

* * * * *

II. The defendant, Joseph P. Carney, at the time of the collection of the taxes sought to be recovered in this action, was Collector of Internal Revenue for the District of Massachusetts, and resides at Boston, in the Commonwealth of Massachusetts, and within the jurisdiction of this court.

III. During the period from September 7, 1933, to October 23, 1934, there was assessed against the plaintiff $5,735.47, under the provisions of Section 501 of the Revenue Act of 1926, as amended by Section 413 (a) of the Revenue Act of 1928, and col-

39 lected from the plaintiff by the defendant. This amount was computed at the rate of 10% on the following items: dues or membership fees $3,475.74; and golf and tennis privileges $2,259.73. Said taxes were collected by the plaintiff from its members at the rate of 10% upon the aggregate amounts paid by each respective member for dues or membership fees and for golf and tennis privileges.

The said amounts assessed against the plaintiff and collected from it by the defendant as taxes with respect to golf and tennis privileges and the dates of such collections are as follows:

Sept. 7, 1933	$155.05	May 23, 1934	$363.55
Sept. 26, 1933	132.90	June 28, 1934	151.20
Oct. 24, 1933	99.68	July 28, 1934	109.00
Nov. 27, 1933	67.20	Aug. 25, 1934	211.80
Dec. 21, 1933	64.45	Sept. 22, 1934	82.50
Jan. 17, 1934	82.10	Oct. 23, 1934	47.50
Feb. 26, 1934	30.70		
Mar. 29, 1934	24.75	Total	2259.73
Apr. 25, 1934	637.35		

* * * * *

V. Within the time prescribed by law and pursuant to Article 54 of Treasury Regulations 43, the plaintiff, in behalf of, and as agent for, its present or former members (or the personal representatives of any deceased member), on November 16, 1935, duly filed with the Commissioner of Interal Revenue a claim for refund in the amount of $9,211.25, alleging as a ground therefor that the amounts collected from its members for golf and tennis privileges were not subject to tax under the provisions of Section 501 of the Revenue Act of 1926, as amended by Section 413 (a) of the Revenue Act of 1928. Attached to said claim for refund, in accordance with the provisions of said Article 54, were powers of attorney, duly verified, in the form attached to the declaration and marked Exhibit B, and by reference made a part hereof, from its present or former members (or the personal representatives of any member then deceased), authorizing the plaintiff to act in their behalf in filing said claim for refund, and suing, either in its or their names, for the recovery thereof, and setting forth the amount of tax collected by the plaintiff from each of said members, on account of payments for golf and tennis privileges, and paid by plaintiff to the defendant, as hereinbefore set forth, or to Thomas W. White, former Collector of Internal Revenue, or to Thomas B. Hassett, former Acting Collector of Internal Revenue. Of the total amount of said claim for refund, $2,259.73 was paid to the defendant as set forth in paragraph III hereof.

* * * * *

J. DUKE SMITH,
Attorney for Plaintiff.
JOHN A. CANAVAN,
United States Attorney.
By C. KEEFE HURLEY,
Assistant U. S. Attorney,
Attorney for Defendant.

[Memorandum. Certain paragraphs of the foregoing agreed statement of facts are here omitted, as they are identical with those already printed in case No. 7319, Law, on pages 11–14 of this volume. James S. Allen, Clerk.]

41 In United States District Court

Waiver of jury trial

Filed March 3, 1939

It is hereby agreed by the parties hereto that trial by jury is waived.

J. DUKE SMITH,
Attorney for Plaintiff.
JOHN A. CANAVAN,
United States Attorney,
By C. KEEFE HURLEY,
Assistant United States Attorney,
Attorneys for Defendant.

In United States District Court

Supplemental agreed statement of facts

Filed September 12, 1939

[Memorandum. Paragraphs 1, 2, and 3 are here omitted as they are identical with the ones printed in case No. 7319 Law, on page 15 of this volume. James S. Allen, Clerk.]

* * * * *

Of the amount of $2,259.73 referred to in paragraph III of the agreed statement of facts, the sum of $1,868.28 was paid with respect to Full Privileges and Limited Privileges; the sum of $366.95 was paid with respect to Family Limited Privileges; the sum of $10.00 was paid with respect to Full Privileges for sons between 21 and 25 years of age; the sum of $14.60
42 was paid with respect to Family Tennis Privileges; said Privileges being those provided for by Article IX of the By-Laws.

J. DUKE SMITH,
Attorney for Plaintiff.
EDMUND J. BRANDON,
United States Attorney,
By C. KEEFE HURLEY,
Ass't U. S. Attorney,
Attorney for Defendant.

[Memorandum. By agreement of parties, booklet marked Exhibit "A," and excerpts from the By-Laws, marked Exhibit "B," attached to the original supplemental agreed statement of facts, are here omitted. James S. Allen, Clerk.]

Recital as to hearing

Also on said 12th day of September A. D. 1939, said cause comes on for trial and is fully heard by the court on the pleadings, agreed statement of facts, supplemental agreed statement of facts, and evidence, the Honorable Hugh D. McLellan, District Judge, sitting.

In United States District Court

Plaintiff's Amended Requests for Findings of Fact

Presented September 12, 1939

Now comes the plaintiff in the above entitled action and request the court to make the following findings of fact.

1. The plaintiff, during the period September 7, 1933, to October 23, 1934, inclusive, paid to the defendant the sum of $2,259.73, representing a tax of 10% on amounts collected
43 by the plaintiff from its members on account of golf and tennis privileges.

2. Said amount was assessed against the plaintiff, together with the amount of $3,475.74, representing a tax of 10% on amounts collected by the plaintiff from its members on account of dues or membership fees and paid to the defendant.

3. On November 16, 1935, the plaintiff on behalf of and as agent for its present or former members, or the personal representative of any deceased members, pursuant to the provisions of Article 54 of Regulations 43, duly filed with the Commissioner of Internal Revenue a claim for refund in the amount of $9,211.25. Included in said amount were payments made to Thomas W. White, former Collector of Internal Revenue, and to Thomas B. Hassett, former Acting Collector of Internal Revenue.

* * * * *

By its attorney,

J. DUKE SMITH.

[Memorandum. Paragraphs 4–10 inclusive are here omitted as they are identical with the same paragraphs already printed in case No. 7319, Law, on pages 18–19 of this volume. James S. Allen, Clerk.]

In United States District Court

Plaintiff's requests for conclusions of law

Presented September 12, 1939

[Memorandum. Copy of plaintiff's requests for conclusions of law are here omitted as they are identical with those already printed on pages 19–20 of this volume, in case No. 7319, Law. James S. Allen, Clerk.]

44 In United States District Court

Defendants' requests for findings of fact and conclusions of law

Presented September 12, 1939

[Memorandum. Copy of defendants' requests for findings of fact and conclusions of law are here omitted as they will be found printed in case No. 7319, Law, on pages 20–29 of this volume. James S. Allen, Clerk.]

In United States District Court

Defendant's motion for judgment

Filed September 12, 1939

Now comes the United States of America, defendant in the above-entitled action, and moves that judgment be entered in its favor on the pleadings and evidence submitted, together with costs.

EDMUND J. BRANDON,
United States Attorney.
By C. KEEFE HURLEY,
Assistant United States Attorney.

In United States District Court

Plaintiff's motion for judgment

Filed September 12, 1939

Now comes the plaintiff in the above-entitled action and moves that on the pleadings and the evidence judgment be entered for the plaintiff.

By its attorney,

J. DUKE SMITH.

45 Said cause is thence taken under advisement and on the 27th day of October A. D. 1939, an opinion of the court is announced and certain findings of fact and conclusions of law are made, the defendant's motion for judgment being denied, plaintiff to be entitled to judgment for the respective amounts ; and to have been paid and interest thereon.

In United States District Court

Judgment

October 27, 1939

McLELLAN, J. In accordance with the opinion of the court handed down this day, it is ordered Judgment for the plaintiff in the sum of two thousand two hundred and fifty-nine dollars and seventy three cents ($2,259.73), with interest according to law, and for its costs taxed at $.

By the Court:

EDITH G. ROLLINS, *Deputy Clerk.*

In United States District Court, District of Massachusetts

No. 7321, Law Docket

WINCHESTER COUNTRY CLUB, PLAINTIFF,

v.

THOMAS B. HASSETT, FORMER ACTING COLLECTOR OF INTERNAL REVENUE, DEFENDANT

Writ

[SEAL] MASSACHUSETTS DISTRICT, *ss:*

The President of the United States of America, to the Marshal of our District of Massachusetts, or his Deputy, Greeting:

We command you to attach the goods or estate of Thomas B. Hassett, former Acting Collector of Internal Revenue
46 for the District of Massachusetts, of Fitchburg, defendant in our District of Massachusetts, to the value of Five Hundred ($500) Dollars, and summon the said defendant (if he may be found in your district), to appear before our Judge of our District Court, next to be holden at Boston, within and for our said District of Massachusetts, on the 4th Tuesday of June, next. Then and there, in our said Court, to answer unto Winchester Country Club, a corporation organized under the laws of the Commonwealth of Massachusetts and having its principal place of business at Winchester in said district. In an action of contract. To the damage of the said plaintiff (as it says) the sum

of Five Hundred ($500) Dollars, which shall then and there be made to appear, with other due damages. And have you there this Writ, with your doings therein.

Witness, The Honorable Elisha H. Brewster, at Boston, the 20th day of May in the year of our Lord one thousand nine hundred and thirty-eight.

JAMES S. ALLEN, *Clerk*,
By HELEN I. TWEEDY, *Deputy Clerk*.

Officer's return on writ

BOSTON, *May 23, 1938*.

UNITED STATES OF AMERICA,
Massachusetts District, ss:

Pursuant hereunto I have this day attached a chip as the property of the within named Thomas B. Hassett and later on the same day I summoned the within named Thomas B. Hassett to appear at Court and answer as herein directed by giving to him in hand at Boston in the said District an original summons to this writ.

JOHN J. MURPHY, *U. S. Marshal*.
By DANIEL J. CHAPMAN, *Deputy*.

47 The writ in this cause is dated May 20, 1938, and was duly entered at the June Term of this court, A. D. 1938, when and where the parties appeared by their respective attorneys.

In United States District Court

Declaration

Filed June 28, 1938

The plaintiff, Winchester Country Club, for cause of action against the defendant, Thomas B. Hassett, former Acting Collector of Internal Revenue for the District of Massachusetts, alleges:

1. That the plaintiff now is, and at all times hereinafter mentioned was, a corporation organized under the laws of the Commonwealth of Massachusetts, having its principal place of business in Winchester in said Commonwealth, and within the jurisdiction of this court.

2. That the defendant, Thomas B. Hassett, at the time of the collection of the taxes sought to be recovered in this action, was Acting Collector of Internal Revenue for the District of Massachusetts, and resides at Fitchburg, in the Commonwealth of Massachusetts, and within the jurisdiction of this court.

3. That during the period from November 28, 1934, to January 9, 1935, the defendant, acting under the provisions of Section 501

of the Revenue Act of 1926, as amended by Section 413 (a) of the Revenue Act of 1928, assessed upon and collected from the plaintiff a tax of 10% of the amount paid by the members of the plaintiff for "dues or membership fees," and, purporting to act under said law, erroneously and illegally assessed upon and collected from the plaintiff a tax at the rate of 10% upon the amounts paid by said members for golf privileges. Said taxes were collected by plaintiff from its members at said rate of 10% upon the
48 aggregate amounts paid by each respective member for dues and membership fees and for golf privileges, and this suit is brought under authority from, as agent for, and for the benefit of, the respective members (or the personal representatives of any deceased member) of the plaintiff from whom said taxes were collected, as more particularly hereinafter set forth.

4. That the amounts so erroneously and illegally assessed upon and collected from the plaintiff by the defendant as taxes on golf privileges, and the dates of such collection are as follows:

Nov. 28, 1934	$38.60
Dec. 21, 1934	29.05
Jan. 9, 1935	37.15
Total	104.80

5. That the members of the plaintiff from whom the plaintiff has collected the taxes referred to in the preceding paragraph and the amount of taxes so collected are set forth in Exhibit A, hereto attached and made a part hereof.

6. That the by-laws of the plaintiff, in force during the entire year 1934 and 1935, insofar as pertinent to this action, provided as follows:

ARTICLE IX

Dues, Privileges and Fees

The annual dues of a member shall be $50. A member shall have all the privileges of the Club except golf.

Privileges:

	Fees one year
Full privileges	$50
Limited privileges	35
49 Family privileges:	
1. Tennis—	
One person	10
Two persons	15
Three persons	20
Four or more persons	25
2. Limited privileges—	
One person	20
Two persons	30
Three persons	40
Four or more persons	50
3. Full privileges for son between 21 and 25 years of age	50

Limited privileges means unlimited house and tennis privileges and golf privileges except on Saturday afternoons, Sunday mornings, and holidays during April, May, June, September, October, and November. A member may have limited privileges on payment of the dues and prescribed fee. The number having limited privileges shall be determined by the Board of Directors.

7. That the golf privileges during the said period were entirely optional with the plaintiff's members; that there was but one class of membership, and no separate class of golf membership.

8. That under the provisions of Section 501 of the Revenue Act of 1926, as amended by Section 413 (a) of the Revenue Act of 1928, the amounts paid by members of the plaintiff on account of golf privileges were not subject to tax, and the tax collected by the defendant from the plaintiff on said amounts was erroneously and illegally collected.

50 9. That within the time prescribed by law and pursuant to Article 54 of Treasury Regulations 43, the plaintiff, in behalf of, and as Agent for, its present or former members (or the personal representatives of any deceased member), on November 16, 1935, duly filed with the Commissioner of Internal Revenue a claim for refund in the amount of $9,211.25, alleging as a ground therefor that the amounts collected from its members for golf and tennis privileges were not subject to tax under the provisions of Section 501 of the Revenue Act of 1926, as amended by Section 413 (a) of the Revenue Act of 1928; that attached to said claim for refund, in accordance with the provisions of said Article 54, were powers of attorney, in the form hereto attached, marked Exhibit B, and made a part hereof, from its present or former members (or the personal representatives of any member then deceased), authorizing the plaintiff to act in their behalf in filing said claim for refund, and in suing, either in its or their names, for the recovery thereof, and setting forth the amount of tax collected by the plaintiff from each of said members, on account of payments for golf and tennis privileges, and paid by plaintiff to the defendant, as hereinbefore set forth, or to Thomas W. White, former Collector of Internal Revenue, or to Joseph P. Carney, former Collector of Internal Revenue; that of the total amount of said claim for refund, $9,211.25, $104.80 was paid to the defendant as set forth in paragraph 4 hereof.

10. That by letter dated June 9, 1936, the Commissioner of Internal Revenue rejected said claim for refund in its entirety; that this suit is brought within two years from said date, in accordance with the provisions of Section 3226 of the Revised Statutes, as amended.

Wherefore, the plaintiff, as agent for and in behalf of and for the benefit of its present and former members as
51 set forth in said Exhibit (and the personal representatives of any deceased member) prays judgment against the defendant in the amount of $104.80, with interest according to law, and for its costs.

By its attorney,

J. DUKE SMITH.

[Memorandum. By consent of parties, copy of Exhibit A, a list of names and amounts collected, and Exhibit B, form of power of attorney, attached to the original declaration, are here omitted. James S. Allen, Clerk.]

In United States District Court

Answer

Filed July 19, 1938

Now comes the defendant in the above-entitled action and for his answer to the declaration on file herein, denies each and every material allegation, item, count, and particular in said declaration contained.

By his Attorney,

JOHN A. CANAVAN,
Acting United States Attorney,
By GEORGE F. GARRITY,
Assistant United States Attorney.

This cause was thence continued from term to term to the December Term, A. D. 1938, when, to wit, December 14, 1938, it was ordered by the court, the Honorable George C. Sweeney, District Judge, sitting, that the law cases numbered 7319, 7320, and 7321 be consolidated.

52 On the said 14th day of December, said cause was set down for pre-trial, the Honorable George C. Sweeney, District Judge as aforesaid, sitting, and the following Pre-Trial Order was entered, jury being waived in open court, stipulation of facts to be filed:

In United States District Court

Pre-trial order

December 14, 1938

[Memorandum. Pre-trial order will be found printed in case No. 7319, Law, on page 10 of this volume. James S. Allen, Clerk.]

In United States District Court

Agreed statement of facts

Filed March 3, 1939

* * * * *

II. The defendant, Thomas B. Hassett, at the time of the collection of the taxes sought to be recovered in this action, was Acting Collector of Internal Revenue for the District of Massachusetts, and resides at Fitchburg, in the Commonwealth of Massachusetts, and within the jurisdiction of this court.

III. During the period from November 28, 1934, to January 9, 1935, there was assessed against the plaintiff $609.58, under the provisions of Section 501 of the Revenue Act of 1926, as amended by Section 413 (a) of the Revenue Act of 1928, and collected from the plaintiff by the defendant. This amount was computed at the rate of 10% on the following items: dues or membership fees $504.78; and golf privileges $104.80. Said taxes were collected by the plaintiff from its members at the rate of 10% upon the aggregate amounts paid by each respective member for dues or membership fees and for golf privileges.

53 The amounts assessed against the plaintiff and collected from it by the defendant as taxes on golf privileges, and the dates of such collections are as follows:

Nov. 28, 1934	$38.60
Dec. 21, 1934	29.05
Jan. 9, 1935	37.15
Total	104.80

* * * * *

V. Within the time prescried by law and pursuant to Article 54 of Treasury Regulations 43, the plaintiff, in behalf of, and as agent for, it present or former members (or the personal representatives of any deceased member), on November 16, 1935, duly filed with the Commissioner of Internal Revenue a claim for refund in the amount of $9,211.25, alleging as a ground therefor that the amounts collected from its members for golf and tennis privileges were not subject to tax under the provisions of Section 501 of the Revenue Act of 1926, as amended by Section 413 (a) of the Revenue Act of 1928. Attached to said claim for refund, in accordance with the provisions of said Article 54, were powers of attorney, duly verified, in the form attached to the declaration and marked Exhibit "B," and by reference made a part hereof, from its present or former members (or the personal representatives of any member then deceased), authorizing the piaintiff to act in their behalf in filing said claim for refund,

and in suing, either in its or their names, for the recovery thereof, and setting forth the amount of tax collected by the plaintiff from each of said members, on account of payments for golf and tennis privileges, and paid by plaintiff to the defendant, as hereinbefore set forth, or to Thomas W. White, former Collector of Internal Revenue, or to Joseph P. Carney, former
54 Collector of Internal Revenue. Of the total amount of said claim for refund, $104.80 was paid to the defendant as set forth in paragraph III hereof.

* * * * *

J. DUKE SMITH,
Attorney for Plaintiff.
JOHN A. CANAVAN,
United States Attorney.
By C. KEEFE HURLEY,
Assistant United States Attorney,
Attorney for Defendant.

[Memorandum. Certain paragraphs of the foregoing agreed statement of facts are here omitted, as they are identical with those already printed in case No. 7319, Law, on pages 11–14 of this volume. James S. Allen, Clerk.]

In United States District Court

Waiver of jury trial

Filed March 3, 1939

It is hereby agreed by the parties hereto that trial by jury is waived.

J. DUKE SMITH,
Attorney for Plaintiff.
JOHN A. CANAVAN,
United States Attorney.
By C. KEEFE HURLEY,
Assistant United States Attorney,
Attorneys for Defendant.

55 In United States District Court

Supplemental agreed statement of facts

Filed September 12, 1939

[Memorandum. Paragraphs 1, 2, and 3 are here omitted as they are identical with the ones printed in case No. 7319, Law. James S. Allen, Clerk.]

* * * * *

Of the amount of $104.80 referred to in paragraph III of the agreed statement of facts, the sum of $93.85 was paid with respect to Full Privileges and Limited Privileges; the sum of $10.95 was paid with respect to Family Limited Privileges; said Privileges being those provided for by Article IX of the By-Laws.

J. DUKE SMITH,
Attorney for Plaintiff.
EDMUND J. BRANDON,
United States Attorney.
By C. KEEFE HURLEY,
Asst. U. S. Attorney,
Attorney for Defendant.

[Memo... dum. By agreement of parties, booklet marked Exhibit A, and excerpts from the By-Laws, marked Exhibit B, attached to the original supplemental agreed statement of facts, are here omitted. James S. Allen, Clerk.]

Recital as to hearing

Also on said 12th day of September A. D. 1939, said cause comes on for trial and is fully heard by the court on the pleadings, agreed statement of facts, supplemental agreed statement of facts, and evidence, the Honorable Hugh D. McLellan, District Judge, sitting.

56 In United States District Court

Plaintiff's amended requests for findings of fact

Presented September 12, 1939

Now comes the plaintiff in the above entitled action and requests the court to make the following findings of fact.

1. The plaintiff, during the period November 28, 1934, to January 9, 1935, inclusive, paid to the defendant the sum of $104.80, representing a tax of 10% on amounts collected by the plaintiff from its members on account of golf privileges.

2. Said amount was assessed against the plaintiff, together with the amount of $504.78, representing a tax of 10% on amounts collected by the plaintiff from its members on account of dues or membership fees and paid to the defendant.

3. On November 16, 1935, the plaintiff on behalf of and as agent for its present or former members, or the personal representatives of any deceased member, pursuant to the provisions of Article 54 of Regulations 43, duly filed with the Commissioner of Internal Revenue a claim for refund in the amount of $9,211.25.

Included in said amount were payments made to Thomas W. White, former Collector of Internal Revenue, and to Joseph P. Carney, former Collector of Internal Revenue.

4. By letter, dated June 9, 1936, the Commissioner of Internal Revenue notified the plaintiff that its claim for refund was rejected in full.

5. This suit was brought within two years from said date, pursuant to the provisions of Sec. 3226 of the Revised Statutes, as amended.

6. The plaintiff had but one class of membership, with the exception of a small class of Special Members.

57 7. Golf privileges were optional with members, and under the by-laws and under the policy of the plaintiff could be acquired informally at any time.

8. Under the by-laws and the policy of the plaintiff there was no liability of the plaintiff's members, once they had acquired golf privileges, to pay for them for a succeeding year, if they did not surrender such privileges prior to the close of the plaintiff's fiscal year.

9. No formal action with respect to surrendering golf privileges was required by the by-laws of the plaintiff or under its general policy.

10. Fees paid for golf privileges were not fixed and definite charges applicable to all members of any particular class of membership.

By its attorney,

J. DUKE SMITH.

In United States District Court

Plaintiff's requests for conclusions of law

Presented September 12, 1939

[Memorandum. Copy of plaintiff's requests for conclusions of law are here omitted as they are identical with those already printed on pages 19–20 of this volume, in case No. 7319 Law. James S. Allen, Clerk.]

In United States District Court

Defendants' requests for findings of fact and conclusions of law

Presented September 12, 1939

[Memorandum. Copy of defendants' requests for findings of fact and conclusions of law are here omitted as they will be found printed in case No. 7319 Law, on pages 20–29 of this volume. James S. Allen, Clerk.]

58 In United States District Court

Defendant's motion for judgment

Filed September 12, 1939

Now comes the United States of America, defendant in the above-entitled action, and moves that judgment be entered in its favor on the pleadings and evidence submitted, together with costs.

EDMUND J. BRANDON,
United States Attorney.
By C. KEEFE HURLEY,
Assistant United States Attorney.

In United States District Court

Plaintiff's motion for judgment

Filed September 12, 1939

Now comes the plaintiff in the above-entitled action and moves that on the pleadings and the evidence judgment be entered for the plaintiff.

By its attorney,

J. DUKE SMITH.

Said cause is thence taken under advisement and on the 27th day of October A. D. 1939, an opinion of the court is announced and certain findings of fact and conclusions of law are made, the defendant's motion for judgment being denied, plaintiff to be entitled to judgment for the respective amounts found to have been paid and interest thereon.

In United States District Court

Judgment

October 27, 1939

McLELLAN, J. In accordance with the opinion of the court handed down this day, it is ordered, Judgment for
59 the plaintiff in the sum of one hundred and four dollars and eighty cents ($104.80), with interest according to law, and for its costs taxed at $.

By the Court:

EDITH G. ROLLINS, *Deputy Clerk.*

In United States District Court

No. 7319, Law.

WINCHESTER COUNTRY CLUB *v.* THOMAS W. WHITE, FORMER COLLECTOR OF INTERNAL REVENUE

No. 7320, Law.

WINCHESTER COUNTRY CLUB *v.* JOSEPH P. CARNEY, FORMER COLLECTOR OF INTERNAL REVENUE

No. 7321, Law.

WINCHESTER COUNTRY CLUB *v.* THOMAS B. HASSETT, FORMER ACTING COLLECTOR OF INTERNAL REVENUE

Opinion

October 27, 1939

McLELLAN, J. In each of these three cases, the Winchester Country Club, concededly a "social, athletic, or sporting club or organization" within the meaning of the statute imposing a tax on "club dues or membership fees," sues as agent for and on behalf of its present and former members and the personal representatives of any deceased member. In each case, the principal question is whether payments by club members (in addition to their regular annual dues) for certain golf privileges and tennis privileges were club dues or membership fees within the meaning of Section 413 of the Revenue Act of 1928, reading:

SEC. 413. CLUB DUES TAX:

(a) Section 501 of the Revenue Act of 1926 is amended to read as follows:

"SEC. 501. (a) There shall be levied, assessed, collected, and paid a tax equivalent to 10 per centum of any amount paid—

"(1) As dues or membership fees to any social, athletic, or sporting club or organization, if the dues or fees of an active resident annual member are in excess of $25 per year; or

"(2) As initiation fees to such a club or organization, if such fees amount to more than $10, or if the dues or membership fees, not including initiation fees, of an active resident annual member are in excess of $25 per year.

"(b) Such taxes shall be paid by the person paying such dues or fees.

"(c) There shall be exempted from the provisions of this section all amounts paid as dues or fees to a fraternal society, order, or association, operating under the lodge system, or to any local fraternal organization among the students of a college or uni-

versity. In the case of life memberships a life member shall pay annually, at the time for the payment of dues by active resident annual members, a tax equivalent to the tax upon the amount paid by such a member for dues or membership fees other than assessments, but shall pay no tax upon the amount paid for life membership.

"(d) As used in this section, the term 'dues' includes any assessment irrespective of the purpose for which made; and the term 'initiation fees,' includes any payment, contribution, or loan required as a condition precedent to membership, whether or not any such payment, contribution, or loan is evidenced by a certificate of interest or indebtedness or share of stock, and irrespective of the person or organization to whom paid, contributed, or loaned."

In the first case, numbered 7319, the plaintiff seeks to recover from Thomas W. White, former Collector of Internal
61 Revenue, that portion of payments made to him which represented taxes on payments made by club members for golf privileges and tennis privileges. The claim is for $6,846.72 paid to the defendant and interest thereon.

In the second case, numbered 7320, the plaintiff seeks to recover $2,259.73 paid to Joseph P. Carney, former Collector of Internal Revenue, and interest thereon. This payment represents a 10% tax on amounts collected by the plaintiff from its members on account of golf and tennis privileges.

In the third case, numbered 7321, the plaintiff seeks to recover $104.80 paid Thomas B. Hassett, former Acting Collector, and interest thereon. This payment represents a 10% tax on amounts collected by the plaintiff from its members on account of golf privileges.

FINDINGS OF FACT

These cases were heard together upon agreed statements of fact here adopted as a portion of my findings of fact, and upon evidence adduced at the trial. These findings of fact, accordingly, are based in part upon the agreed facts and in part upon other evidence not inconsistent therewith.

The plaintiff at all material times was and now is a Massachusetts corporation located in the Town of Winchester. The respective defendants were Collectors of Internal Revenue for the District of Massachusetts and each in that capacity collected the taxes, as hereinafter indicated, the recovery whereof is here sought.

The Winchester Country Club, plaintiff herein, started as a small golf club, in 1902. As time went on the facilities of the Club included a club house, which had cost over $100,000 and was

owned by a real estate trust of the Massachusetts type. Before they were superseded in January, 1929, the bylaws had contained provisions as to members and their election which in accordance with the defendants' request, I set forth in detail as follows:

62 ARTICLE VII

Members and Their Election

The number of members of the Corporation shall be fixed from time to time by the Board of Directors, but shall not exceed four hundred and twenty-five having golf privileges.

ARTICLE VIII

Initiation Fees

The initiation fee for members shall be ($100) and for special members ($25).

ARTICLE IX

Dues and Assessments

The annual dues shall be as follows:

Class A. Membership, including golf and tennis privileges, $75.

Class B. Membership, including tennis but not including golf privileges, $40.

Special Membership, $40.

Associate Membership Dues

1. First Associate Membership under Class A, including golf and tennis privileges, $20. Second and Third Associate Memberships, $10 each.

2. First Associate Membership under Class B, including golf and tennis privileges, $35 for the first, and for additional associate memberships, $15 each. For tennis privileges alone, $10 for the first associate, $5 for the second and third.

Family Memberships

Family Memberships, Sections 1 and 2 of four or more persons, under Class A, $115; under Class B, $100. Under Class B, with tennis privileges, only $60.

63 In 1929, some of the members interested in the town belonged to the Club because they wanted to help it, though they played no golf. Others had no interest in golf or tennis, but joined for the sake of their children and took out a full membership plus privileges for their families. In 1929 there were 425

members in full standing and as many as 100 more who wanted to play golf but could not be taken into membership. And to the latter limited privileges of using the golf course except at certain times were extended and for these privileges they paid. As Mr. John Abbott, a witness called by the plaintiff, testified in substance, and as I find:

"One outgrowth of that situation was that—for example, taking people who had special golf privileges and were not members of the Club. If we had an assessment—and I might parenthetically state we did because we tried to run the Club altogether within our income—we were not trying to make money, we were trying to reduce our indebtedness, and these 100 or 125 men who came from Arlington or Winchester were not subject to the assessment.

"That did not seem quite right. We felt that we ought to have a membership which might be unlimited; that the privileges, those who took its privileges should be limited to the capacity, whether it be golf or hockey or curling or anything else; and we conceived the idea, which I think was not new then, but had been growing in the minds of us who were responsible for the finances, that the logical, the proper thing to do with a club which had developed a value to the member as a member was that it should have membership dues or admission to be paid; that those who had, who wished any particular privileges such as those I have referred to—the privilege of golf, or, in the case of children, privileges of skating and winter sports, tennis, golf, many of them—that they should pay for what they got. That
64 would leave the people or the men I have spoken of who had been supporting the Club because they were citizens and believed it to be a good thing for the town but had no interest in it, in any of its activities—leave them members of our Club—leaving them subject to assessments, that is true, if we overrun our income, but not compelling him to pay for something that he did not get.

"Now there was another angle, another consideration which was of force in trying to run the finances of this Club. The Club itself, the Club property itself is owned by what we know as an ordinary Massachusetts real estate trust. The Club does not own it. The trust issued a mortgage on the property for all it could borrow, and the equity in the land is owned by the trustees, that interest being represented by trust certificates of $100 each, and those certificates are outstanding in the hands of purchasers. It was the desire of the Club and the original plan, although nothing worked out in 1929 just as we planned it, that those certificates should be owned only by club members, and the further

ambitious idea that ownership should be spread evenly over the Club. Well, of course the yonger men could not afford to buy them, the older men were willing to take them, so that spreading out evenly idea did not work.

"These 100 to 125 men who had the limited privileges of playing golf in our Club had none of the obligations of the members. They had no obligation on an assessment that I referred to; they were under no obligation whatever to buy these certificates because it was not a written rule of the Club, there was not in the by-laws nor in our constitution any requirement that a member should own certificates, but it was an unwritten gentlemen's understanding that if they could afford to they would. And these outside fellows who had no Club membership, when it came to—they said, 'we don't care to own certificates in a Club that we are not members of'; and we felt that if those men could be brought in as members with the obligations of a member, it would help us in our financing. We felt, too, that the opening up of the membership as a membership with unlimited members would increase our income and increase the assets of the Club.

"Now those were the primary, fundamental reasons for this change, and they had been under consideration, as I remember it, for some time or some plan to work out an equitable situation. Mr. Barton and I went over the whole matter and decided that $50 for full golf privileges was a fair arrangement. We thought the amount of money that was invested in the buildings which are the reasons for a general club membership on the one hand, and the money invested in the land and the improvement of the course on the other hand, were not far from each other. That is I think it was practically fifty-fifty."

With these considerations in mind, the plaintiff enacted new by-laws such as appear in the agreed statements of facts. They went into effect in January 1929, and, save for an increase in the authorized number of members having full privileges from 425 to 475, remained in effect as late as the institution of these suits. Pertinent excerpts from these by-laws follow:

ARTICLE VII

Members and Their Election

The number of members of the Corporation shall be fixed from time to time by the Board of Directors, but shall not exceed four hundred and twenty-five (later 475) having full privileges. * * *

Article VIII

Initiation Fees

The initiation fee for members shall be $100 and for special members $25.

66

Article IX

Dues, Privileges and Fees

The annual dues of a member shall be $50. A member shall have all the privileges of the Club except golf.

Privileges:	Fees one year
Full Privileges	$50
Limited Privileges	35
Family Privileges:	
1. Tennis—	
One Person	10
Two Persons	15
Three Persons	20
Four or more Persons	25
2. Limited Privileges—	
One Person	20
Two Persons	30
Three Persons	40
Four or more Persons	50
3. Full Privileges for sons between 21 and 25 years of age	50

Full privileges means all the privileges of the Club. A member may have full privileges on payment of the dues and prescribed fee.

Limited privileges means unlimited house and tennis privileges and golf privileges except on Saturday afternoons, Sunday mornings, and holidays during April, May, June, September, October, and November. A member may have limited privileges on payment of the dues and prescribed fee. The number having limited privileges shall be determined by the Board of Directors.

67 A member may have for one or more of his immediate family tennis privileges by payment of the dues and prescribed fee.

A member who himself has either full privileges or limited privileges may have for one or more of his immediate family limited privileges by payment of the dues and prescribed fee.

A member who has neither full nor limited privileges may have for one or more of his immediate family limited privileges upon payment of Thirty ($30) Dollars in addition to the dues and prescribed fee.

Immediate family means the mother, wife, children, brother, or sister of a member who resides with such member, but not including a married son or daughter nor a man over twenty-five years of age.

A lady not eligible to family privileges may become a special member of the Club with limited privileges upon election by the Board of Directors, but shall have no interest in the property of the club. Her annual dues shall be $50. A special member may not have family privileges for others.

Dues and fees shall be payable on March 1st of each year, provided that payment of one-half of the dues and fees may be deferred until July 1st. A member whose dues and fees or either of them, remain unpaid sixty (60) days after they are payable, shall be posted in the Club House; and if payment be not made w ain thirty (30) days thereafter, the member may at the discretion of the Board of Directors be dropped from membership.

An extra assessment at the discretion of the Board of Directors on each member may be levied if found necessary for the interest on t · mortgages or other obligations of the Corporation.

68 Th Board of Directors may deny the privileges to any person.

A person having a family limited privilege who shall be elected to membership, at the discretion of the Directors, may not be required to pay an initiation fee.

The Club year shall be from January 1st to December 31st.

Any member elected after August 1st shall pay one-half of the annual dues and fees.

Any member disobeying any rule of the Club may be suspended from all privileges of the Club or may be expelled from the Club by the Board of Directors.

The names of all members failing to pay assessments and indebtedness to the Club, if in excess of $10 other than annual dues and fees, before the twentieth of the month following the date such debt is incurred, shall be posted in the Club House. If payment be not made within twenty days thereafter the credit of such member shall be stopped, and all privileges of the Club denied him and the member may, at the discretion of the Board of Directors, be dropped from the Club list.

The defendants' position, as I understand it, is that by its classification of privileges in its by-laws the Winchester Country Club created various classes of membership. But I find in the by-laws above set forth only two classes of membership, namely members, who paid an initiation fee of $100 and annual dues of $50 and special members consisting of women not eligible to family privileges who paid an initiation fee of $25 and annual

dues of $50. No controversy here exists as to the taxability of such initiation fees and membership dues. They were paid and no claim for their recovery is made.

69 The question in the first two cases is whether sums paid for golf and tennis privileges were subject to tax as Club "dues or membership fees" and in the third case whether sums paid for golf privileges were thus taxable. These questions depend not only upon the Club bylaws but also upon other evidence adduced at the trial, which confirms the view that persons who acquired golf privileges or tennis privileges did not constitute special classes of membership.

Members were permitted to engage privileges for either themselves or their families quite informally. The practice was merely to let the officers know in some way either in writing or orally what privileges were wanted. No action was ever taken by the Board of Directors approving or disapproving such action. Privileges were dropped in the same informal manner; and if privileges were taken or dropped in the middle of the year, suitable adjustments were made. Members were billed in March for dues and for privileges for the coming year. If no word had been received from a member as to the privileges desired, the same privileges as he had previously held were included on his bill, but he was quite at liberty to strike off such privileges as he did not want, and no attempt was made to collect for privileges thus dropped. On the other hand, by Article X of the bylaws, "A member not resigning before the beginning of the Club year shall be liable for the dues for that year." The Club year began January first.

Women were allowed to use the course only during certain specified times. As heretofore stated, provision was also made for a special membership for women who wished to play golf, but had no male relatives eligible for membership. Such women paid an initiation fee, and annual dues of $50, but held no interest in the club property and were not allowed to vote. They were not allowed to play golf except at such times as

70 other women were allowed on the course. It may be repeated that no question is here involved relative to amounts paid by such women.

Upon the agreed facts and all the other evidence, I find that the plaintiff had but one class of membership with the exception of a small class of special members, that neither possessors of golf privileges nor the holders of tennis privileges constituted a separate class of membership, that golf privileges and tennis privileges were optional with members and under the by laws and the Club practice or policy could be acquired informally at

any time, that once acquired there was no recurring obligation to take or pay for them in a succeeding year, that no formal action was required for surrendering such privileges during the year and that the fees therefor were not fixed or definite charges of any particular class of membership.

This completes the attempt to state the facts applicable to all the cases. As to the first case, numbered 7319, I also find:

1. The plaintiff during the period November 27, 1931 to July 26, 1933, inclusive, paid to the defendant the sum of $6,846.72, representing a tax of 10% on amounts collected by the plaintiff from its members on account of golf and tennis privileges.

2. Said amount was assessed against the plaintiff, together with the amount of $5,363.86, representing a tax of 10% on amounts collected by the plaintiff from its members on account of dues or membership fees and paid to the defendant.

3. On November 16, 1935, the plaintiff on behalf of and as agent for its present or former members, or the personal representatives of any deceased member, pursuant to the provisions of Article 54 of Regulations 43, duly filed with the Commissioner of Internal Revenue a claim for refund in the amount of $9,211.25.

Included in said amount were payments made to Joseph
71 P. Carney, former Collector of Internal Revenue, and to Thomas B. Hassett, former Acting Collector of Internal Revenue.

4. By letter, dated June 9, 1936, the Commissioner of Internal Revenue notified the plaintiff that its claim for refund was rejected in full.

5. This suit was brought within two years from said date, pursuant to the provisions of Sec. 3226 of the Revised Statutes, as amended.

As to the second case, numbered 7320, I also find:

1. The plaintiff during the period September 7, 1933 to October 23, 1934, inclusive, paid to the defendant the sum of $2,259.73, representing a tax on 10% on amounts collected by the plaintiff from its members on account of golf and tennis privileges.

2. Said amount was assessed against the plaintiff, together with the amount of $3,475.74, representing a tax on amounts collected by the plaintiff from its members on account of dues or membership fees and paid to the defendant.

3. On November 16, 1935, the plaintiff on behalf of and as agent for its present or former members, or the personal representatives of any deceased member, pursuant to the provisions of Article 54 of Regulations 43, duly filed with the Commissioner of Internal Revenue a claim for refund in the amount of $9,211.25. Included in said amount were payments made to

Thomas W. White, former Collector of Internal Revenue, and to Thomas B. Hassett, former Acting Collector of Internal Revenue.

4. By letter, dated June 9, 1936, the Commissioner of Internal Revenue notified the plaintiff that its claim for refund was rejected in full.

5. This suit was brought within two years from said date, pursuant to the provisions of Sec. 3226 of the Revised Statutes, as amended.

72 As to the third case, numbered 7321, I also find:

1. The plaintiff, during the period November 28, 1934, to January 9, 1935, inclusive, paid to the defendant the sum of $104.80, representing a tax of 10% on amounts collected by the plaintiff from its members on account of golf privileges.

2. Said amount was assessed against the plaintiff, together with the amount of $504.78, representing a tax of 10% on amounts collected by the plaintiff from its members on account of dues or membership fees and paid to the defendant.

3. On November 16, 1935, the plaintiff on behalf of and as agent for its present or former members, or the personal representatives of any deceased member, pursuant to the provisions of Article 54 of Regulations 43, duly filed with the Commissioner of Internal Revenue a claim for refund in the amount of $9,211.25. Included in said amount were payments made to Thomas W. White, former Collector of Internal Revenue, and to Joseph P. Carney, former Collector of Internal Revenue.

4. By letter, dated June 9, 1936, the Commissioner of Internal Revenue notified the plaintiff that its claim for refund was rejected in full.

5. This suit was brought within two years from said date, pursuant to the provisions of Sec. 3226 of the Revised Statutes, as amended.

CONCLUSIONS

The problem here presented is discussed in six cases to which my attention has been called. In four of them, the taxpayer prevailed and in two he lost.

In Weld v. Nichols, 9 F. (2d) 277, decided in the Massachusetts District Court, the plaintiff was a resident active annual
73 member of the Brookline Country Club. He paid regular annual dues of $125, elected to play golf and paid the additional fee of $7.50 for that privilege for six months. On this fee of $7.50, a tax of 75 cents was assessed. The assessment was declared invalid and the Court said:

"It seems clear that in clause (b) the words in question (dues or membership fees) must refer to definite obligations incidental to membership in the Club. Presumably the same expression is used in the same sense throughout the section. If so, the words 'dues or membership fees,' in clause (a), were meant to cover only fixed and definite charges applicable to all members of each particular class of membership. This seems to me to be the underlying intention of the section."

When the controversy in the Weld case arose, the definition of the term "dues" as including "any assessment irrespective of the purpose for which made" appearing in clause (d) of the statute had not been enacted. This I deem of no great consequence because I do not regard the payments for a license to use a golf course as the payment of an assessment and because also of the decision in Baltimore Country Club v. United States, 7 F. Supp. 607, to which I shall refer in its chronological order.

In Foran v. McLaughlin, Collector, 59 F. (2d) 158, decided by the Circuit Court of Appeals, ninth circuit, in 1932, the taxpayer was defeated. In that case the plaintiff sought to recover a 10% tax exacted upon certain payments to the Olympic Club. These payments amounting to $52 were in addition to the regular monthly dues of $6 as an active resident member. The Court said:

"The question presented * * * is whether these monthly 'green fees' were or were not 'dues' within the meaning of Section
801 of the Revenue Act of 1921. Admittedly daily green
74 fees are not taxable. Therefore the only question is whether
such 'green fees' when paid monthly as fixed and recurring obligations that carried with them rigid contractual liability, lost their character as casual green fees and became 'dues.'"

The Court then set forth certain evidence and said:

"The foregoing excerpts from the minutes clearly indicate that, by whatever name these Class A memberships were called, they entailed upon their holders a fixed contractual liability to pay monthly green fees, regardless of their desire to continue to use the greens" * * * They "represented a recurring contractual obligation, extending over an indefinite period of time, and, in the language of the Weld case, supra, 'incidental' to a 'particular class of membership.'"

The facts found in this case, where judgment was against the taxpayer, are so utterly different from the facts in the cases at bar that it is here of importance only for its recognition of the doctrine of the Weld case.

In Baltimore Country Club v. United States, 7 F. Supp. 607 Judge Coleman approved and followed the Weld case and dis-

tinguished his from the Foran case "because there the Court was dealing with monthly green fees paid by everyone of a special class of club members, which represented recurring contractual obligations extending over an indefinite period of time, that is as long as the members of that class held their membership." The Baltimore Country Club case decides in substance that annual golf fees exacted only from those members of the Country Club who desired the privilege of playing golf are not taxable as club "dues or membership fees." This was so held notwithstanding
75 clause (d) of Section 413 of the Revenue Act of 1928, which declares that the term "dues" includes any assessment irrespective of the purpose for which made.

In Williamson v. United States, 12 F. Supp. 26, the District Court for the Western District of North Carolina held that semiannual charges for use of the golf course to members of the Charlotte Country Club who paid a separate initiation fee and annual dues were not taxable as club "dues or membership fees." Following the Weld case and the Baltimore Country Club case, Judge Webb says of the Foran case: "The case of Foran v. McLaughlin (c. c. a.) 59 F. (2d) 158, relied upon by the government, does not seem to be on all fours with the case at bar because there a special Class A membership had been created and all members of 'Class A' were required to pay a monthly greens fee of $4 as long as they remained Class A members, whether they desired to play golf or no..."

Two additional cases have been brought to my attention, both decided by Judge Kirkpatrick in the District Court for the Eastern District of Pennsylvania. Neither is at war with the Weld case. In Hardt v. McLaughlin, 25 F. Supp. 684, Judge Kirkpatrick upon the facts there presented held charges paid by members of the Merion Cricket Club for playing golf taxable as club "dues or membership fees." In Philadelphia Cricket Club v. United States, decided March 17, 1939, he concluded upon different facts that charges paid for golf privileges were not so taxable. In the latter case the Court pointed out three differences between the Philadelphia Club and the Merion Club, and said in substance:

At the Merion Club, the general membership could use the course only upon payment of daily green fees. At Philadelphia any member could pay the annual golf fees and have full use of the club course for the current year. At Merion, the obligation
to pay annual golf charges was binding for the full year
76 for which it was undertaken, and it was recurring, that is, unless before the end of the year, the club was notified

that the member did not want privileges for the following year, he would be deemed to have assumed a binding obligation to pay for them. At the Philadelphia Club, it appeared that if the obligation was assumed for a year, it could be reduced to six months, and it was not recurring. At Merion, the legal characteristics of the obligations to pay the golf charges were exactly the same as that to pay the general club dues. At Philadelphia, they were quite different.

I find nothing in the foregoing cases or elsewhere indicating that the charges for golf and tennis privileges involved in the cases at bar constituted club "dues or membership fees." Where, as heretofore found, the holders of golf and tennis privileges constituted no class of membership, where the golf and tennis privileges involved were optional and could be acquired informally, where having been acquired there was no recurring obligation to take or pay for them in a succeeding year, and where no formal action was required for their surrender during the year, the charges for such privileges cannot be regarded as taxable club "dues or membership fees."

The taxes exacted were without statutory authority and upon the foregoing "Findings of Fact" the plaintiff is entitled to judgment for the respective amounts heretofore found to have been paid and interest thereon.

Such judgments may be entered.

NOTE.—The foregoing is intended as a compliance with Rule 52 (a) of the Federal Rules of Civil Procedure. In vew of that portion of the rule providing that "requests for findings of fact are not necessary for purposes of review," it is probably unnecessary to pass upon such requests. It may be conducive to clarity, however, if I add here that I have intended to, and if
77 permissible under the Rules do now grant in substance the plaintiff's requests for Findings of Fact, and the defendants' requests for Findings numbered I to VI and VIII to XIII inclusive. The defendants' requests for Findings numbered XIV to XVII have in effect been denied in that portion of the foregoing decision entitled "Findings of Fact," as was VII which is inconsistent with the by-laws, See Article IX, supra. The plaintiff's requests for Rulings of Law need no comment and the defendants' four requests for "Conclusions of Law" and motion for judgment are denied.

In United States District Court

No. 7319, Law

WINCHESTER COUNTRY CLUB

v.

THOMAS W. WHITE, FORMER COLLECTOR

No. 7320, Law

WINCHESTER COUNTRY CLUB

v.

JOSEPH P. CARNEY, FORMER COLLECTOR

No. 7321, Law

WINCHESTER COUNTRY CLUB

v.

THOMAS B. HASSETT, FORMER ACTING COLLECTOR

Statement of evidence

Before McLELLAN, J.

Appearances

For the Plaintiff, J. Duke Smith, Esq.

For the Defendants, Edmund J. Brandon, Esq., United States Attorney, by Edward First, Esq., Special Assistant to the Attorney General; and C. Keefe Hurley, Esq., Assistant United States Attorney.

COURT ROOM NO. 2,
FEDERAL BUILDING,
Boston, Tuesday, September 12, 1939. 2 p. m.

The CLERK. 7319, 7320, and 7321, Winchester Country Club against Thomas W. White, Joseph P. Carney, and Thomas B. Hassett.

78 Mr. SMITH. Plaintiff.

Mr. HURLEY. Defendant. May it please your Honor, I wait to introduce at this time Mr. First, Edward First, of the Department of Justice, from Washington, who is a member of the United States Bar and in good standing. I would like to move his admission.

The COURT. We are glad to see Mr. First.

Mr. FIRST. Thank you.

Mr. SMITH. May I ask your Honor if you have read the pleadings and the agreed statement of facts?

The COURT. I have.

Mr. SMITH. We have prepared and signed a supplemental agreed statement of facts in each case. May I file those? In these supplemental agreed statements we have agreed that the bylaws in force during the years in question here, November 27, 1931, to January 9, 1935, are appended to each supplemental agreed statement of facts; that these bylaws, as amended, were passed by the Club at an annual meeting on January 29, 1929; and that prior to that time there were Class A memberships, including golf and tennis, $75, and Class B memberships, including tennis but not golf, $50. We have also appended certain other provisions of the bylaws prior to the meeting of January 29, 1929, which I do not believe are material to the issue and which I will not refer to at this moment.

The COURT. We are to try the case entirely upon the agreed statements of fact, are we?

Mr. SMITH. No, your Honor. I have four witnesses whose testimony will be short, I think.

Article IX of the bylaws is in substance what appears in the declaration in each case as to the annual dues, $50, and certain privileges; so I do not think I will take up the main statement of fact and read that at this time.

The COURT. All right.

Mr. SMITH. In the supplemental stipulation we have further agreed that, of the total amount collected for golf and
79 tennis privileges, $9,211.25, $7,432.25 was collected for golf privileges, either full privileges or limited privileges—$50 and $35, originally; $1,697 for family privileges, $29 for golf privileges by sons of members, and $53 for tennis for members of various families of members.

The sole question is whether or not these amounts sued for were properly collected as a 10 percent tax on dues or membership fees in the Club. No question is raised as to the amount paid for annual dues, namely, $50.

I have four witnesses I would like to have sworn, if your Honor please.

The COURT. Very Well.

[Four witnesses are sworn.]

JOHN ABBOTT, Sworn.

Direct examination by Mr. SMITH:

Q. 1. What is your full name?—A. John Abbott.

Q. 2. And where do you live?—A. Winchester.

Q. 3. What is your business?—A. Lawyer.

Q. 4. Are you a member of the Winchester Country Club, and, if so, how long have you been a member?—A. I am and have been since its formation in 1902.

Q. 5. During that time what offices, if any, have you held and now hold in the Club?—A. Originally as a director; later, I think, as secretary; earlier in the history of the Club as vice president, and for some 22 years its president, ending in 1934.

Q. 6. President until 1934?—A. I was president for 22 years up to and including 1934.

Q. 7. During the time when you were president whether or not you were active in handling the Club property?—A. Yes.

Q. 8. And the construction of the golf course?—A. Yes.

Q. 9. And the financial affairs of the Club?—A. Yes.

80 Q. 10. Who, if anyone, was closely associated with you in those matters?—A. Most closely associated was Joseph L. S. Barton, who has just been sworn as a witness.

Q. 11. He has been treasurer of the Club?—A. For a number of years, I think practically 20—but he can tell better than I.

Q. 12. It is stipulated and agreed that the bylaws in force over the period here in question, November 27, 1931, to January 9, 1935, were passed at a meeting of the Club on January 29, 1929. Will you tell the Court what the reasons were for the changes that were made in the bylaws as to dues and privileges?—A. The Club had started as a small Club, as a golf Club, in 1902. Its popularity increased and its activities increased, and the financial set-up of the Club became more and more complex until it was deemed advisable to change the situation because of its effect upon the various kinds of membership and the various uses that people made of the privileges of the Club. From a small clubhouse which was a farmhouse we had developed into a house which I think cost over $100,000. I mention that merely to indicate that it had become more or less a real club. Certainly it was the aim of the directorate that it should be so. And we found in our membership situations like these:

We had men who were interested in the town and belonged to the Club because they wanted to help it although they never saw or never played golf.

There were people in the town who did not want to play tennis or even golf or enter into any kind of activity but wanted their children to. They would become members of the Club, and they took out the full membership plus something for their children.

It was in the days of prosperity and prosperity of the Club, and we had applications from people whom we could not grant admission. We had 425 members in full standing, and there were, I think, as many as 100 more, men who
81 wanted to play golf but we could not take them into membership, and they were granted what we called limited privileges of using the course, with specified dates omitted, for which they had to pay.

Now that was a complex situation, and it grew more complex as we went along. I think we had only recently then either finished or had about finished our clubhouse; and we had, either just then or about the year 1930, completed our 18-hole course, which was originally 9-hole, and there were privileges——

Q. 13. Let me interrupt a minute. You refer to the date of the annual meeting in January 1929?—A. 1929, as I have it in mind generally. I don't remember particularly. So that there were problems of financing coming up. Now, one outgrowth of that situation was that—for example, taking people who had special golf privileges and were not members of the Club. If we had an assessment—and I might parenthetically state we did because we tried to run the Club altogether within our income—we were not trying to make money, we were trying to reduce our indebtedness, and these 100 or 125 men who came from Arlington or Winchester were not subject to the assessment.

That did not seem quite right. We felt that we ought to have a membership which might be unlimited; that the privileges, those who took its privileges should be limited to the capacity, whether it be golf or hockey or curling or anything else; and we conceived the idea, which I think was not new then, but had been growing in the minds of us who were responsible for the finances, that the logical, the proper thing to do with a club which had developed a value to the member as a member was that it should have membership dues or admission to be paid; that those who had, who wished any particular privileges such as those I have referred to—the privilege of golf, or, in the case of children, privileges of skating and winter sports,
82 tennis, golf, many of them—that they should pay for what they got. That would leave the people or the men I have spoken of who had been supporting the Club because they were citizens and believed it to be a good thing for the town but had no interest in it, in any of its activities—leave them

members of our Club—leaving them subject to assessments, that is true, if we overrun our income, but not compelling him to pay for something that he did not get.

Now there was another angle, another consideration which was of force in trying to run the finances of this Club. The Club itself, the Club property itself is owned by what we know as an ordinary Massachusetts real estate trust. The Club does not own it. That trust issued a mortgage on the property for all it could borrow, and the equity in the land is owned by the trustees, that interest being represented by trust certificates of $100 each, and those certificates are outstanding in the hands of purchasers. It was the desire of the Club and the original plan, although nothing worked out in 1929 just as we planned it, that those certificates should be owned only by Club members, and the further ambitious idea that ownership should be spread evenly over the Club. Well, of course the younger men could not afford to buy them, the older men were willing to take them, so that spreading out evenly idea did not work.

But the point I want chiefly to refer to is this. These 100 to 125 men who had the limited privileges of playing golf in our Club had none of the obligations of the members. They had no obligation on an assessment that I referred to; they were under no obligation whatever to buy these certificates because it was not a rule, a written rule of the Club, there was not in the by-laws nor in our constitution any requirement that a member should own certificates, but it was an unwritten gentleman's understanding that if they could afford to they would. And these outside fellows who had no Club membership, when it
83 come to—they said, "We don't care to own certificates in a Club that we are not members of"; and we felt that if those men could be brought in as members, with the obligations of a member, it might help us on our financing. We felt, too, that the opening up of the membership as a membership with unlimited members would increase our income and increase the assets of the Club.

Now those were the primary, fundamental reasons for this change, and they had been under consideration, as I remember it, for some time or some plan to work out an equitable situation.

Q. 14. May I ask you one question. I understand that you and Mr. Barton went over the whole matter and decided that $50 for annual dues and $50 for full golf privileges was a fair arrangement—A. Yes; that is true.

Q. 15. How did you arrive at those figures?—A. Well, I must say I left a good deal of it to Mr. Barton but if I was to go right at it as a Yankee I would say this: That, looking at

our property interests, I think that the amount of money that was invested in the buildings which are the reasons for a general club membership on the one hand, and the money invested in the land and the improvement of the course on the other hand, were not far from each other. That is, I think it was practically fifty-fifty. But that is only a rule-of-thumb way of getting at it. I am sure that Mr. Barton and his assistant as treasurer went over that matter very carefully, and I am sure that I was in on the discussion, but I do not remember very much about the details. He can tell you more about that than I can.

Mr. SMITH. I think that is all.

Mr. FIRST. I will just ask a few questions, but before I proceed I should like to hand up a trial brief which indicates in short fashion what the Government's position is.

The COURT. Have you given a copy to Mr. Smith?

Mr. FIRST. I intend to as soon as my examination is over.

The COURT. As soon as what is over?

84 Mr. FIRST. This cross-examination of the witness is, sir.

The COURT. All right. I will receive your brief at the time you deliver a copy to Mr. Smith.

Mr. FIRST. The reason I wanted it now is I thought you might want to glance at it to see the purpose of my questions.

The COURT. It may be handed up later.

Cross-examination by Mr. FIRST:

X Q. 16. Mr. Abbott, I understand that one of the reasons for the change in the bylaws was to secure additional revenue?—A. That is right; yes, sir.

X Q. 17. Now it was though that it was unfair to have all members pay the same amount, assuming that anybody does not enjoy or take advantage of all the facilities of the Club; is that right?—A. Yes.

X Q. 18. Now a member of the Club, before these new bylaws were adopted, would pay $75: is that right?—A. That must be a matter of record. I think probably that is correct.

X Q. 19. That is what I believe. If anybody wanted——

The COURT. Oh, well, I do not pay any attention to that, that is, his saying it is right, because it is not the way to prove it.

Mr. SMITH. We have stipulated that, your Honor.

Mr. FIRST. Yes, that is stipulated.

The COURT. All right.

X Q. 20. Anybody who wanted to enjoy the privileges he had before the bylaws, the new bylaws, were adopted would have to pay how much after the new bylaws were adopted?—A. Fifty dollars, as I recall it, for the dues, and if he wanted to have the golf privileges, fifty more, if I recall.

X Q. 21. In other words, $100 would give him the same rights he had before the new bylaws were adopted?—A. I think that is right.

85 X Q. 22. Did I understand you to say that in classifying those members who did not want to play golf or use the other facilities to the same extent as those who bought both privileges provision was made for a full payment of $50?—A. That is right. Membership in the Club.

Mr. First. That is all.

Joseph L. S. Barton, Sworn

Direct Examination by Mr. Smith

Q. 1. What is your full name, Mr. Barton?—A. Joseph L. S. Barton.

Q. 2. And where do you live?—A. Winchester.

Q. 3. What is your business?—A. Banking.

Q. 4. At what address?—A. 60 State Street.

Q. 5. I will ask you if you are a member of the Winchester Country Club?—A. I am

Q. 6. For how many years have you been a member?—A. Since its organization, 1902.

Q. 7. What offices, if any, have you held in the Club during that period?—A. I was one of the organizers and was a director—I wouldn't say how long, but I was treasurer from 1911 until 1934.

Q. 8. You have heard the testimony of Mr. Abbott, and I will ask you whether or not it is true in all respects?—A. I think it is.

Q. 9. Have you anything to add to Mr. Abbott's testimony as to why the changes were made as they were in the by-laws at the annual meeting of January 29, 1929?—A. I have not. I think he answered it.

Q. 10. Now, when you and Mr. Abbott arrived at the figure of $50 for the annual dues and $50 for golf privileges, how did you come to those figures?—A. Well, it would be pretty hard to remember back those years and think how we figured it but

86 I know that we spent quite a lot of time and went into a lot of discussion in trying to arrive at what we thought was a fair figure, that is, a fair amount to charge a man that played golf. The regular, that is, the membership in the Club was to be $50, and then we tried to find what we thought was a fair amount, and we took the expenses of the Club as far as the upkeep of the golf course went and the maintenance of the golf

property and so forth, and we figured that $50 was the fair amount at that time to charge for golf privileges.

The Court. I have heard nothing about tennis privileges, have I?

Mr. Smith. Well, if your Honor please, the tennis privileges here were fairly small. They were limited privileges to members of a person's family.

The Court. Was the right to play tennis a part of the mere membership, or was there some charge for tennis? Because I understand your tennis payments are involved in this litigation.

Mr. Smith. (reading). "Limited privileges mean unlimited house and tennis privileges and golf privileges except on Saturday afternoons, Sunday mornings, and holidays during April, May, June September, October, and November."

The Court. When a man pays his $50 for membership in the Club, did he have the right to use the tennis courts for that mere $50?

Mr. Smith. I beg your Honor's pardon. In the first part of Article IX (reading) "The annual dues of a member shall be $50. A member shall have all the privileges of the Club except golf." Does that answer your question?

87 The Court. Well, then, why are you suing for taxes that you paid in connection with tennis?

Mr. Smith. The tennis, your Honor, is only covered under the limited family privileges; that is, with his family privileges, one person who wants to play tennis, $10, two persons $15, and so forth.

The Court. I think you have not made it very clear to me. Perhaps it is my fault. If a man is a member and that is all he is, he pays $50 a year, doesn't he?

Mr. Smith. Yes, sir; $50 a year.

The Court. Does he also have the right to play tennis himself in connection with that flat membership?

Mr. Smith. He does, your Honor.

The Court. No additional charge is made to him for the privilege of personally playing on the tennis court; is that right?

Mr. Smith. That is right.

Q. 11. That is right, Mr. Barton?—A. I think that is right.

The Court. Well, then, if some member of his family is to have the right to play tennis, some charge is made to him for that privilege?

Mr. Smith. It is, your Honor.

The Court. On the payment made for the benefit of the member's family the Government assessed and exacted a tax?

Mr. Smith. Exactly.

The Court. And it is for that reason that we have tennis dues involved with this litigation?

Mr. Smith. Yes, your Honor.

The Court. Don't say "yes" just to be pleasant. That is a fact, is it?

Mr. Smith. That is a fact.

The Court. All right.

88 Q. 12. Who handled the books while you were treasurer, Mr. Barton?—A. Mr. Hovey.

Q. 13. How did a member obtain golf privileges or relinquish them?—A. Well, the system was this. If a man wanted golf privileges, he saw Mr. Hovey or he saw me or telephoned the office, or very often we would send out a bill and he would write on the bill "the golf privilege is requested"; also, if he did not want golf privileges or did not want any privileges that had been billed him, he would cross them off from his bill, or telephone us that he did not want golf privileges, or his daughter had gone abroad and she was not going to have the golf privileges, or for any reason they would take the privileges off their bill at any time.

Q. 14. You were a member of the directors all the time you were treasurer?—A. I was; yes, sir.

Q. 15. Were requests for golf or tennis privileges ever referred to the board of directors?—A. Never.

Q. 16. Or requests to have golf or tennis privileges surrendered?—A. Never. It was automatic. They could do just as they chose.

Mr. Smith. That is all.

The Court. How many members did the Club have, roughly, during the period covered by this litigation? Do you remember?

The Witness. Well, I think perhaps Mr. Hovey could tell better but the limited number in those years was 425.

The Court. Roughly—though I suppose I could find it in the agreed statement—how many of the, say, 400 members exercised golf privileges of one kind or another?

The Witness. I would not know. I do not remember but I think Mr. Hovey could probably answer it when he takes the stand.

The Court. Do you know, vaguely, what that figure was?

Mr. Smith. I know, your Honor, there were several hundred members who had golf privileges but I do not

89 remember the number of members who had no golf privileges at all, and I wish to bring that out through Mr. Hovey.

The Court. Is that a subject matter of the agreed statement?

Mr. Smith. No, your Honor; it is not.

The Court. You are going to bring that fact out sometime?

Mr. Smith. Yes; I am.

Cross-examination by Mr. FIRST:

XQ. 17. It was stated in the agreed statement that a member who had neither full privileges nor limited privileges could not play golf. That is a fact?—A. That is right.

XQ. 18. Could such a member in any circumstance play golf on the Winchester Country Club course except by the purchase of full privileges or limited privileges; in other words, could he go and play golf and pay a greens fee?—A. Yes, he could.

XQ. 19. Whether he owned limited privileges or full privileges or not—A. That is right. In any year he could play just the summer guest time, which was once a month.

The COURT. Do you limit—it is only curiosity—playing guests if they come from a distance?

The WITNESS. No, sir. At that time—I take it you are talking about 1929—at that time the Club was full, and if a man lived, I think the rule was, 40 miles from Boston at that time, he could play oftener than once a month but anyone within 40 miles could play only once a month.

XQ. 20. I missed part of that, and may I ask you a question? I think what you said was there was a restriction of that sort under the new by-laws?—A. That is right; 1929.

XQ. 21. After 1929?—A. Yes, sir.

Mr. FIRST. That is all

90 JOHN P. CARR, Sworn.

Direct examination by Mr. SMITH:

Q. 1. What is your name, Mr. Carr?—A. John P. Carr.

Q. 2. Where do you live?—A. Winchester.

Q. 3. What is your business?—A. Lawyer.

Q. 4. Are you a member of the Winchester Country Club?—A. Yes.

Q. 5. If so, how long have you been a member?—A. I think 23 or 24 years.

Q. 6. What offices, if any, have you held and now hold in the Club?—A. I was a director, I think, in 1931, and then treasurer, and now I am president.

Q. 7. How long were you treasurer?—A. Three years, I think, or perhaps three and a fraction, or something like that.

Q. 8. Are you familiar with the by laws of the Club in matters relating to payment of dues and the privileges of the members?—A. Yes, sir.

Q. 9. And have been since 1929?—A. Oh, certainly before that.

Q. 10. After the bylaws were amended in 1929, whether or not the Club elected new members?—A. Oh, yes; indeed.

Mr. FIRST. What was your answer?

The WITNESS. Yes, sir.

Q. 11. In applications for membership since that time were golf or other privileges asked for?—A. No.

Q. 12. Did some of the new members obtain golf or other privileges?—A. Yes.

Q. 13. How did they obtain them?—A. Well, I do not know that I can explain it more accurately than Mr. Barton did. It was quite informal, no routine. They asked Mr. Hovey or they asked me when I was an officer, or they referred to the secretary when they were inquiring on the telephone and thereafter by the proc-
91 ess of the locker room or on the course or telephone calls or calls to our offices—any way to get word back to the office as to what they wanted.

Q. 14. If a new member once acquired golf or other privileges in one year, were they included in his bill for the following year?—A. They would be as long as prior to the end of the year he had told us what he wished for the next year, but if nothing was said as a routine matter he would be sent a bill for the same privileges that he had.

Q. 15. How were bills rendered to members after January 29, 1929, who had been Class A members before 1929?—A. They were billed so much for dues and so much for privileges.

Q. 16. Fifty dollars?—A. Fifty dollars; and of course they differed depending on what their privileges were as asked.

Q. 17. Did you yourself receive bills in that form?—A. Yes.

Q. 18. During the period covered by these suits whether or not golf or other privileges were surrendered in certain cases?—A. Oh, yes; many times.

Q. 18a. Whether during that period some members who carried golf membership surrendered their golf privileges?—A. Well, I am not familiar with their names. All that meant that after the adoption of the by-laws a man who had the full golf privileges had to change them either to simple membership or to limited golf privileges, or had associates he took them for. That happened all the time and happened during the course of any one year.

Q. 19. Since 1929, what action did a member take who wished to surrender his golf or other privileges?—A. Well, he might do the same thing. He might see Mr. Hovey or me or Mr. Barton or anybody that he knew to bring word to the office and told them he wanted to give up an associate, or he did not want any golf privileges in that summer, or he wanted limited privileges,
92 or he would write to the secretary, or if at the beginning of the year when the initial bills went out for a certain item the same as he had the previous year, he might instruct us that the bill should show no golf privileges for that year, or whatever the limitation would be or whatever particular way he wanted it.

The COURT. Suppose he had paid up his full golf privileges at the beginning of the year and in September wanted to discontinue: did the discontinuance entitle him to get back any of his money paid for that year?

The WITNESS. If he had not paid it, why then there would be an adjustment of the amount due, and if he had paid it he would receive a refund. I think Mr. Hovey has a case of that kind when he comes to testify.

The COURT. Where a refund was made?

The WITNESS. I can't be sure whether it was or not. Some adjustment was made so the amount charged was commensurate with the amount of time he had the privileges.

The COURT. Not for the full year if he did not use it?

The WITNESS. Quite right.

Q. 20. But no such request was referred to the board of directors?—A. No, sir; not while I was a member, and I as an officer never did, but I knew there was this adjustment on the books, or a notation, and it was not collected anyhow.

Q. 21. Whether or not since January 29, 1929, the Club ever collected or tried to collect from members for the following year the dues or privileges which were not withdrawn prior to the end of the taxable year?—A. If I understand your question, the answer is no. I might amplify it a little on the bills.

Q. 22. Yes.—A. If a bill was sent out, for instance, to a man for dues, $50, and for golf privileges, $50, and he went back and said, "I don't want golf privileges," and he did not send word to them until after March 1st, when he got his bill, no attempt was made whatsoever to collect for golf. That is, he was given that
93 chance to say if he wanted it, and they did very commonly.

Our fiscal year was the calendar year. That is, nobody ever made himself known very much about it until the customary bills went out, which was March 1st.

Q. 23. Was that true from January 29, 1929, over the taxable period in question?—A. I could almost state absolutely for almost any period, for a particular year in which they received that amount or were given an adjustment on the $50 dues.

Q. 24. And the same for the period subsequent to the period in question?—A. Yes, sir.

Q. 25. Do you recall an instance where a member was allowed to surrender his golf privileges?—A. Yes.

Q. 26. Many instances?—A. Oh, I can think—I can't name the individuals but I know it to be a frequent experience.

Q. 27. Whether they paid anything at any time?—A. Yes, sir; at any time.

Q. 28. At any time?—A. Yes, sir; entirely at optional and their pleasure.

Mr. SMITH. I think that is all.

Cross-examination by Mr. First:

X Q. 29. Are the by-laws in operation today the same as they were since 1929, except for the change in the number of members who may possess full privileges? I understand that has been given as 425.—A. I think that during the depression time there was some further concession made to young men under 30, and I do not know whether that was done by vote of the directors or change of the by-laws.

X Q. 30. I just wanted to put my question to you in the present, tense, and if by chance it does not apply to the present time, correct me.—A. So far as the change of numbers is concerned, except for that one thing they are the same.

94 X Q. 31. Article IX of the by-laws speaks of full privileges, limited privileges, and family privileges. What are limited privileges?—A. The limited privileges apply to golf. Any man having those privileges would not be permitted to play—perhaps not hours, but he can't play Saturday afternoons, Sunday mornings, and holiday mornings, except in July and August when so many people were away. He was allowed to play tennis on all days. Now what the hours were within which he had to wait I can't remember but I think it was 11 o'clock and 3 o'clock, or something like that. The question comprehended family privileges?

X Q. 32. No; just limited privileges. The by-laws define limited privileges as follows: "Limited privileges means unlimited house and tennis privileges and golf privileges except on Saturday afternoons, Sunday mornings, and holidays." That definition then of limited privileges includes all that a member who has full privileges has except for these restrictions on certain days as to the use of the golf course?—A. Yes. I won't say that those were the most crowded days.

X Q. 33. May a member buy limited privileges for a member of his family?—A. I am frank to say I don't know. I don't think that ever came up.

X Q. 34. I have here a copy of the by-laws [handing]. You may use it to refresh your memory.

The Court. Is that a matter of stipulation?

Mr. First. The by-laws are.

Mr. Smith. Yes, your Honor.

Mr. First. I would like to ask another question before I ask that.

The Court. Very well.

X Q. 35. You will see "Family Privileges."—A. Yes; under "Limited Privileges." I think I catch your point.

95 The practice is this. If a man having limited privileges wanted an associate, his wife, for instance, one person, he

would pay $20 for her; whereas a man who had full privileges, that is, paid $50 membership and $50 golf, if he wanted his wife to have also tennis privileges he would have to pay $10 for it. That is what that first section means, Mr. First. Your question as to whether a fellow could buy limited privileges, I don't think that was ever contemplated because the women were limited as to the times they could play anyway, and that would take care of that fellow. I don't remember whether there was a restriction about young people or not.

X Q. 36. Let me reword my question. A member who wanted his wife or family to enjoy all the privileges of the Club, and wanted of course to receive all the use of the tennis courts or something else, could arrange for those privileges to be extended to his wife?—A. Yes.

X Q. 37. By the payment of an additional sum?—A. That is right.

X Q. 38. And the additional sums which might be paid are contained in Article IX of the by-laws?—A. That is correct.

X Q. 39. If that man wanted these limited privileges for his wife or his son, he would have to pay how much?—A. That is what I am saying to you. We never had limited privileges for an associate, nor were they ever requested.

X Q. 40. For an associate?—A. No. The limited privileges were for people—a man who was a member could have limited privileges. He could have the same privileges during the summer months but they were wholly enjoyed in the period which was restricted so that a man could use fully the limited privileges of the membership itself. The privileges for associates were limited to certain associates. The distinct connection between the limited privileged member and the full privileged member was that both enjoyed the same privileges but you paid a
96 different sum for it because the basic part was you paid a lower fee in one case than in the other.

X Q. 41. I am trying to follow that phase out. We have two cases—one, a member who has purchased neither full privileges nor limited privileges; he has just paid $50.—A. That is right.

X Q. 42. He wants his wife to enjoy the privileges of the Club.—A. Yes.

X Q. 43. All privileges—skating, tennis, golf.—A. Yes.

X Q. 44. What additional sum must he pay? Before you answer that question, let me call your attention to the third paragraph on the second page of Article IX.—A. I have my thumb on it, I think.

X Q. 45. It says: "A member who has neither full nor limited privileges may have for one or more of his immediate family limited privileges upon payment of Thirty Dollars in addition

to the dues and prescribed fee."—A. As I say, women essentially only play at certain times, anyway.

The COURT. Well, if it was $50 for a man who was merely a member, it was $20 if he was a member with limited privileges, and it was $10 if he had full privileges?

The WITNESS. That is it, your Honor.

The COURT. Why do you spend so much time on that?

Mr. FIRST. I don't believe that is quite accurate.

The COURT. Don't you?

Mr. FIRST. I am assuming that, and I will state it in the form of a question.

X Q. 46. A member who had purchased neither full nor limited privileges paid $50 and that is all; a member who had purchased full privileges paid a total of $100; a member who had purchased limited privileges paid a total of $85; a member who wanted his wife to have the privileges of the
97 Club also, a member who had paid only $50, paid an additional $30, plus $10, that is, $40, in addition to the $50?

The COURT. Thirty plus ten? That is not what I understand.

A. That isn't right.

The COURT. It isn't right?

The WITNESS. No.

X Q. 47. You say that is incorrect?—A. That is incorrect.

X Q. 48. I shall read this paragraph in the by-laws, which says: "A member who himself has either full privileges or limited privileges may have for one or more of his immediate family limited privileges by a payment of the dues and prescribed fee." A member must pay for these privileges the dues and prescribed fee.—A. Wait just a minute and I will be with you. I can't see without my glasses.

X Q. 49. The next paragraph reads: "A member who has neither full nor limited privileges may have for one or more of his immediate family limited privileges upon payment of Thirty Dollars in addition to the dues and prescribed fee." What is the meaning of those two paragraphs?

The COURT. While you study it I will take my five-minute recess.

[Short recess.]

X Q. 50. In asking this question about the 1929 by-laws you may have your answer based on the operation of the by-laws even though they did not entirely accord with the wording
98 of the by-laws. Now I will reword my question so you won't be misled about it. Assume a member who has paid but $50 and has not purchased full privileges or limited privileges, desires to have his wife and mother enjoy the privileges

of the Club? How much in addition to the fifty would he have to pay?—A. He would have to pay $45—$30 for the first one and $15 for the second.

X Q. 51. Assume that a member who has paid $50 and in addition has purchased full privileges, thus paying an additional $50, desires to acquire for his wife and for his mother the privileges of the Club; how much would he have to pay?—A. He would have to pay $30.

The COURT. Twenty and ten?

The WITNESS. Twenty and ten.

X Q. 52. I notice in the by-laws that there are at least two types of membership. Under Article VIII it speaks of initiation——

The COURT. You understand, Mr. First, in making the statement as to what I understood it was, I was talking about one person who was taken in. I meant the mother.

Mr. FIRST. I just wanted to bring out just the difference between the payment made by a member who paid $50 and the payment by a member who had paid more.

The COURT (to witness). Don't you still say I had it right?

The WITNESS. That was the idea.

The COURT. He paid twenty and ten; thirty?

The WITNESS. That is right.

The COURT. A limited member.

The WITNESS. No, thirty and twenty, I should say. A man who had neither full nor limited privileges paid $30, but if the man had paid full privileges up before the 1st of July we would charge him $10. I was looking at the wrong hole. That was for tennis privileges.

X Q. 53. I note there are those classes of members listed in Article VIII which speaks of the membership—$100 for
99 members, and for special members, $25. Can you tell me what are special members?—A. Those were only women people, womenfolk who had no men in their families eligible for membership.

X Q. 54. What did they pay?—A. I beg your pardon?

X Q. 55. How much did such a party pay to become a special member?—A. Dues, $50, and initiation—I think you quoted it correctly but I will find it in a moment. I think it was twenty-five.

X Q. 56. That is on page 11?—A. That is right.

The COURT. Well, now, I do not mean to interfere with the continuity of your examination but I do not understand that this matter about which you are now inquiring is involved in this issue at all.

Mr. First. Well, your Honor, it is to this extent—that a special member has certain privileges which are identical with the member who has purchased limited privileges, and it is admitted by the officer that a special member who pays $50 is a member, and yet they say a member who has purchased limited privileges is a member to the extent of $50 and to the extent of some additional fee. We have that difference in the case of members who have privileges and those who do not, but in the case of the special member with limited privileges they admit he is free from a further fee.

The Court. There is no attempt to recover back any taxes paid on limited and special memberships?

Mr. First. No, I desire to show that.

The Witness. If my testimony has been understood by the Court and Mr. First to be in accordance with his statement, then either I have misunderstood your questions or my answers have been misunderstood.

XQ. 57. To what extent?—A. May I explain that? A special membership is available to a woman and as such has no right to vote at all. She is not a member except she has 100 that. We have regarded her as paying her dues and paid taxes on it. Now, as such she has obtained as an incident of that special membership the right to play golf at certain times. Now the person having limited privileges has obtained the right to play golf at regular times. They are very different times.

XQ. 58. Very different times?—A. Yes, Womenfolk cannot—limited privilege members can play at times when womenfolk cannot.

The Court. As to limited members there is no charge put on them as such for the privilege of playing golf on the days and at the times when they are allowed to play?

The Witness. No, sir, none at all.

The Court. And the full tax or what they paid for those is not sought to be recovered back?

The Witness. On the limited privileges?

The Court. Yes.

The Witness. Yes, that is so. They have paid $35 for that.

The Court. We are talking about the special.

The Witness. Oh, no; nothing whatsoever is sought to be recovered back in any way, shape, or form with respect to the specials.

The Court. Let us see if we understand each other, Mr. Carr. As to the special members, they have the right as an incident of their membership to play golf at certain times?

The WITNESS. That is correct.

The COURT. And on what they pay by way of dues the tax was paid, and no attempt is made to recover back any portion of it?

The WITNESS. Correct.

The COURT. That is what I thought.

X Q. 59. This may be rewording the question but I wish to get this straight. What facilities are available to a member who has purchased unlimited privileges? What facilities
101 which are available to a person who has purchased unlimited privileges are not available to a special member, if any?—A. Well, with those privileges out there, I would say that the right to play golf at certain times is not available to the special member, and the right to vote.

X Q. 60. I mean facilities; what facilities?—A. Oh, facilities. The facilities are there but the right to use them is the difference.

X Q. 61. Did you say that a special member can't use the golf course on certain days that an unlimited privilege holder can use?—A. Yes.

X Q. 62. Can you point out any by-law where such a distinction is made?—A. All special members are women, and women can only play at certain times.

X Q. 63. Where does that appear?—A. No. 10 on page 22: "Women shall not be permitted to use the course on Open Tournament Days, Saturday afternoons between one and six o'clock, Sundays, and holidays until after one o'clock."

X Q. 64. But except for that restriction on hours, the facilities which are available to special members are the same as those available to members with unlimited privileges?—A. Same house, same golf course.

X Q. 65. Suppose a member pays his dues of $50 and acquires full privileges for an additional $50, then after nine months of the year have elapsed asks for a refund for the remaining three months: will he get a proportionate return of the $50?—A. Well, I can't answer whether that is right because I don't know. Those cases arise. But I know of several cases where all payments have not been made in full and the balance of the year has been abated.

X Q. 66. In other words, the Club has not brought suit to compel payment?—A. Oh, heavens no. We have adjusted it with him and settled the bill whenever necessary. That
102 is, I mean the bills which were for using the full privileges of the Club.

X Q. 67. There is no provision in the by-laws giving the member who has full privileges the right to demand a refund?—A. In express words?

X Q. 68. In express words?—A. I wouldn't say so. The fact is it is a privilege and the privilege means you can have it or not as you see fit.

X Q. 69. That is a gratuity on the part of the Club?—A. It is a practice that has been followed since I knew it. Whether it is a gratuity or not I don't know.

Mr. First. That is all.

Harold V. Hovey, Sworn

Direct examination by Mr. Smith:

Q. 1. What is your name?—A. Harold V. Hovey.

Q. 2. Where do you live?—A. Winchester.

Q. 3. What is your business?—A. I am assistant treasurer of the Club.

Q. 4. You live there?—A. I live at the Club.

Q. 5. Are you a member of the Winchester Country Club?—A. Yes, sir.

Q. 6. If so, how long have you been a member?—A. Since 1908.

Q. 7. What offices have you held, if any, or are now holding in the Club?—A. Assistant treasurer since about 1910 or '11, under Mr. Barton.

Q. 8. Since you became assistant treasurer who has kept the books?—A. I kept the books until 1932. They were taken over under a secretary who was employed at the Club. Previous to that time I had kept the books and made the entries that were made, and in——

Q. 9. What time in 1932 did you stop keeping them?—A. It was sometime in April that the books were turned over
103 to this Miss Ruth G. Holden, and she kept them until sometime in March or April 1935, when I went over to the Club to live and took this as a full-time job.

Q. 10. Have you with you the original ledger showing amounts billed to members and the payments made by them?—A. Yes, sir.

Q. 11. What is that book called?—A. That is called the Members' Ledger.

Q. 12. Are those entries in your handwriting for the period——A. Yes; up to 1932 and after 1935 but during that period I knew about them.

Mr. Smith. I offer this book in evidence, your Honor, to show entries made by the witness during the time when he made the entries.

The COURT. Is that not agreed in the stipulation?

Mr. SMITH. No; that is not in the stipulation.

Mr. FIRST. For what purpose is that being offered? What will that contain that is not in the stipulation? I have no objection. I am just inquiring.

Mr. SMITH. This contains various instances where golf and other privileges have been given up or surrendered, showing that in various instances, many instances, informally golf privileges have been dropped.

The COURT. And some of them during, in the middle of the year?

Mr. SMITH. Some of them in the middle of the year.

Mr. FIRST. That does not mean that there was a refund, does it?

Mr. SMITH. No. Is there any objection?

Mr. FIRST. No objection.

The COURT. All right.

(Members' Ledger marked "Plaintiff's Exhibit 1.")

Q. 13. Mr. Hovey, who sent out the bills in 1931 and 1932?—A. I did.

104 Q. 14. During the period from January 1931 to March 1932, whether or not there were instances of golf or other privileges being obtained by members or dropped?—A. Oh, yes.

Q. 15. About how many?—A. Any number of them but I actually found 38 or 39 that I can identify.

The COURT. Where golf privileges were dropped and membership retained?

The WITNESS. Yes; either their own privileges or their wives' or their sons' or their daughters'—without trying to be too specific.

Q. 16. Will you show from your books half a dozen instances where that procedure took place?—A. Here is one, A. C. Waghorne; he added his wife in June of that year. Just previous to that, W. D. Sullivan dropped his golf privileges in May of that year. This is H. M. Mahon; he added his wife in June for golf privileges. Here is another one—W. G. M. Ghirardini added his wife in May. Another one—B. R. Gage was billed for his son, who was over 21, and when he paid his bills for that year he dropped that. George A. Fernald had had full privileges full golf privileges, and he dropped them that year in July. W. E. Clark, Jr., added his wife in July. Those are just picked out at random.

Q. 17. I will ask if this same procedure took place throughout the years in question as well as afterwards?—A. Yes. They are still going on.

Q 18. Whether or not you have found instances in your books where golf privileges were dropped and a member charged for only half a year?—A. Yes; we have one absolute case—Mr. Parker Hart—and I know of others—who was billed for dues and privileges, and he only paid for full dues and half a year's privileges—in other words, $75.

Q. 19. Since the by-laws were amended in 1929, now did a member obtain golf or other privileges?—A. Well, I can amplify the other testimony to this extent, to say it was
105 most informal. Most of it came indirectly in many ways. I would get it on the golf course, in the locker room, and I believe there have been cases of men sticking their heads out in the middle of a shower bath—"Oh, don't bill me for Jane this year, she is going to be away." And then of course there were some by letter, by telephone, through Mr. Barton and through Mr. Carr.

Q. 20. Were privileges ever dropped by a member striking off the item from his bill?—A. Yes; that was done too.

Q. 21. There were no votes taken on those.—A. No.

Q. 22. So far as you know?—A. No. Sometimes he would telephone that he was going to be away and I would say, "Strike it off the bill," or he would meet me somewhere and I would say, "Strike that off your bill and then when you send your check I will know what you are paying for."

Q. 23. Were requests to drop golf privileges or to surrender them ever referred to the board of directors?—A. No. Members were asked for that information, and I would say no.

Q. 24. They were handled by your own office entirely?—A. Yes, sir.

Q. 25. All during this period, as well as before and after?—A. Yes.

Mr. Smith. This is the question your Honor inquired about, and I will ask him about the members that had no golf privileges.

Q. 26. During the years 1931 to 1934, of the total members how many were without golf privileges?—A. In 1931 there were 43; in 1932, 60; in 1933, there were 60; in 1934, there were 70.

The Court. And the total membership during those periods—have you that?

The Witness. The total membership in 1931 was 547. That included full and limited privileges. At that time there
106 couldn't be but 425 full privileges. The next year it was 425, in 1933 it was 379, and in 1934 it was 341.

Q. 27. I hand you an undated mimeographed letter headed, "Treasury Department, Internal Revenue Bureau, Boston, Mass.," and ask you whether that letter was received by the plaintiff corporation?—A. Yes; that was received by the Club.

Q. 28. And about when, do you know?—A. I think the latter part of 1934 or early 1935.

Mr. SMITH. I would like to offer that.

Mr. FIRST. For the purpose of the record, I want to object to the admission of that, but I have no objection to your Honor seeing it. It is merely a statement from the Bureau concerning its course of conduct, its interpretation of the law. For the record, I object to its admission.

The COURT. I can't pass upon it without seeing it. [Handed document.] What is the date of it?

Mr. SMITH. It is undated, your Honor, but the witness has testified that it was received sometime in the early part of 1934, that is, the latter part of 1934 or the first part of 1935, corresponding to about the time that the last payment was made on account of these taxes.

The COURT. Well, how is it admissible?

Mr. SMITH. It is admissible, it seems to me, your Honor, in this way: That it was a communication received from the Collector here in Boston, received by the Club, showing that in view of certain court decisions they were no longer taxable and they have never been taxed since.

Mr. FIRST. That is not in the evidence.

The COURT. Oh, I know. I exclude that letter.

Mr. SMITH. If your Honor please, may I connect it up with the witness' testimony that since receiving this letter no attempt has ever been made to collect taxes on golf or tennis privileges from the plaintiff Club, and that they have never received any demand from the Collector?

107 Mr. FIRST. Of course that is irrelevant.

The COURT. I exclude that letter and the offer of proof and save your exception. The letter which I am excluding is a letter purporting to bear the typewritten name of Mr. Hassett, Collector for this district. That I add so it may be known what I am excluding.

Q. 29. Mr. Hovey, when was the last payment made by the Club on account of golf or tennis privileges?

Mr. FIRST. Objection.

Q. 30 (continued). Made to the Collector?

The COURT. What is the purpose of that, Mr. Smith?

Mr. SMITH. I withdraw the question, your Honor.

The COURT. I ask, not for the purpose of being disagreeable, but I just do not see its competency. You withdraw it, do you?

Mr. SMITH. Well, I withdraw it for this reason, because I think it is, I was going to say, stipulated, but I don't think it is.

It is stipulated that the last payment for which recovery is sought in this suit is January 9, 1935.

Q. 31. Since January 9, 1935, has the Collector ever demanded any taxes from the Winchester Country Club?

Mr. First. Objection.

The Court. Excluded. As I understand it, you are asking as of a period not covered by these actions.

Mr. Smith. Not covered by these actions, that is right. The plaintiff rests, your Honor.

Cross-examination by Mr. First:

X Q. 32. You testified concerning a number of members during certain periods of the Winchester Country Club.

The Court. The plaintiff's evidence is still going in. I shall not accept the resting.

Mr. Smith. I beg your pardon, your Honor.

X Q. 33. Do you say you had 547 members in 1931?—A. Yes, sir.

108 X Q. 34. Does that include all persons who paid $50 whether they purchased limited privileges or full privileges or no privileges?—A. Yes, sir.

X Q. 35. Of the 547 members what number were members with full privileges? Did you get that question?—A. Yes; how many were full members.

X Q. 36. Of the 547 that had full privileges.—A. At that time there were 425.

X Q. 37. How many had limited privileges?—A. I can't say definitely.

X Q. 38. Did you say that only 43 of all the members did not have either full or limited privileges at that time?—A. I mean to say that 43 had no golf privileges at all. Does that answer your question?

X Q. 39. No; full privileges or limited privileges or any with privileges for which additional payments had to be made?—A. That is right.

X Q. 40. During the year 1932 you say you had 425 members. Do you mean 425 members who paid at least $50?—A. Yes.

X Q. 41. What number of the 425 members had full privileges?—A. That I can't say. I didn't——

X Q. 42. You testified that 60 of the 425 had neither full nor limited privileges; is that correct?—A. Yes.

X Q. 43. In the year 1933 were there 379 members who had paid $50 at least? The answer is yes?—A. Yes, sir.

X Q. 44. Of that 379 there were only 60 who did not possess some of the additional privileges referred to in Article IX of the bylaws?—A. They did not possess any golf privileges.

X Q. 45. Or any of the privileges for which additional payments had to be made?—A. That is right.

X Q. 46. And during the year 1934 there were 341 members who had paid $50 at least?—A. Yes, sir.

109 X Q. 47. And of that number there were these 70 who did not pay additional amounts for the so-called privileges of Article IX?—A. Yes, sir.

X Q. 48. On the bills which were sent to members was there provision made for full privileges, limited privileges, or in what manner are those privileges billed? What are they called?—A. The first line of the bills is for dues. The second line is for privilege fees, and in that we group the amounts—for instance, $50, and then he is billed $20 for his wife and $10 for his son. That was all on one line.

X Q. 49. All on one line?—A. All on one line.

X Q. 50. For privileges?—A. For privileges.

X Q. 51. There was no line called "Golf privileges"?—A. No.

X Q. 52. Suppose a man played golf with guests for which there were additional greens fees; assume they decide at the time to charge those fees on his monthly account or some account. I repeat the question. Is it possible for a member who has had to pay or required to pay additional daily greens fees to charge them to his account?—A. Oh, yes, sir.

X Q. 53. How was that billed to him? What is it called on his bill?—A. That is grouped under house charges. Anything that is bought in the house is charged.

X Q. 54. In referring to the original book you spoke of some instances where a member had his daughter added. Will you explain what he did if he had his wife added. What did that cause you to do?—A. I don't understand.

X Q. 55. You testified that various members would add their wives to the membership or whatever it was.—A. Oh, add the privilege fees to his account.

X Q. 56. When you were told to add privileges for a man's wife, did you bill him in full or for those privileges?—A. Up to the 1st of August he is billed for the full year; after the 1st of August he is billed for half a year.

110 X Q. 57. When a man who has membership with full privileges decides that the following year he merely wants to be a member, he notifies you to that effect?—A. Yes.

X Q. 58. That is what you mean when you say you were told to drop a man's privileges?—A. Yes, sir.

X Q. 59. Therefore, thereafter he was just an ordinary member?—A. Yes, sir.

X Q. 60. Paying just $50?—A. Yes, sir.

X Q. 61. And if he thereafter decided to acquire the right to use all of the facilities you had, he would advise you to that effect and you would bill him for fifty plus fifty; is that right?—A. Yes, sir.

Mr. FIRST. That is all.

The COURT. Now, Mr. Smith, do I understand you to rest?

Mr. SMITH. I rest, your Honor.

The COURT. Anything in reply?

Mr. FIRST. The Government has no further evidence, your Honor. We have here formal motions for judgment which I will now submit. [Handing to clerk.]

The COURT. Very well. Now, have you given a copy of your reply brief to Mr. Smith?

Mr. FIRST. Yes, sir.

The COURT. Then I will read yours. How long do you want to argue, gentlemen?

Mr. SMITH. I was wondering, your Honor, if we could withdraw this exhibit at this time because we need it?

The COURT. On the understanding that I consider only the oral testimony with reference to it, or do you want to later let me have it? I don't care which you do.

Mr. SMITH. No; I think just the oral testimony in connection with it is all we need.

The COURT. All right.

Mr. FIRST. The Government has no objection to that.

111 The COURT. All right. Then you may take it. Is it marked as an exhibit?

The CLERK. I did not put any Government marking on it.

The COURT. I should think that is all right. It is withdrawn as an exhibit.

[Closing arguments.]

In United States District Court

Defendants' motion to consolidate cases No. 7319, 7320, and 7321 for the purposes of appeal

Filed January 26, 1940

Now come the defendants by their attorney, Edmund J. Brandon, United States Attorney for the District of Massachusetts, and move that for the purposes of the records on appeal said causes be forthwith consolidated; and that, as said causes

were heard and decided at the same time, and to make said consolidation effective, and to carry out the purpose thereof, a single notice of appeal and a single designation of points to be relied on, and a praecipe, and a record to be bound in one volume be filed to cover the three above-mentioned cases.

EDMUND J. BRANDON,
United States Attorney.
By C. KEEFE HURLEY,
Assistant U. S. Attorney.

Assented to.
J. DUKE SMITH
Attorney for the Plaintiff.
Allowed 1-26-1940.
GEO. C. SWEENEY,
United States District Judge.

112 In United States District Court

Notice of appeal of Thomas W. White, Joseph P. Carney, and Thomas B. Hassett

Filed January 26, 1940

No. 7319, Law

WINCHESTER COUNTRY CLUB

v.

THOMAS W. WHITE, FORMER COLLECTOR OF INTERNAL REVENUE

No. 7320, Law

WINCHESTER COUNTRY CLUB

v.

JOSEPH P. CARNEY, FORMER COLLECTOR OF INTERNAL REVENUE

No. 7321, Law

WINCHESTER COUNTRY CLUB

v.

THOMAS B. HASSETT, FORMER ACTING COLLECTOR OF INTERNAL REVENUE

Come now the defendants, Thomas W. White, Joseph P. Carney, and Thomas B. Hassett, by Edmund J. Brandon, United States Attorney for the District of Massachusetts, and serve

notice that they appeal to the Circuit Court of Appeals for the First Circuit from the judgments for the plaintiff entered by this Court on the date of October 27, 1939.

EDMUND J. BRANDON,
United States Attorney.
By C. KEEFE HURLEY,
Assistant U. S. Attorney.

In United States District Court

Statement of points to be relied upon

Filed March 22, 1940

No. 7319, Law

WINCHESTER COUNTRY CLUB

v.

THOMAS W. WHITE, FORMER COLLECTOR OF INTERNAL REVENUE

No. 7320, Law

WINCHESTER COUNTRY CLUB

v.

JOSEPH P. CARNEY, FORMER COLLECTOR OF INTERNAL REVENUE

No. 7321, Law

WINCHESTER COUNTRY CLUB

v.

THOMAS B. HASSETT, FORMER ACTING COLLECTOR OF INTERNAL REVENUE

The appellants, Thomas W. White, Joseph P. Carney, and Thomas B. Hassett, hereby state that in their appeal to the Circuit Court of Appeals of the United States for the First Circuit from the final judgment entered in the above-entitled causes on October 27, 1939, they intend to rely on the following points:

113 The District Court erred in concluding:

(1) That the Winchester Country Club had but one class of members, with the exception of a small class of special members.

(2) That the charges made for so-called privileges were not fixed or definite charges of any particular class of membership.

(3) That amounts paid to the Winchester Country Club pursuant to Article IX of the Bylaws were not dues or membership fees.

EDMUND J. BRANDON,
United States Attorney.
By C. KEEFE HURLEY,
Assistant United States Attorney.

In United States District Court

Stipulation as to Contents of Record on Appeal

Filed March 22, 1940

It is stipulated by the parties hereto that the following shall constitute the record on appeal:

A. Law No. 7319:

1. Writ.
2. Plaintiff's declaration as amended, omitting Exhibit A.
3. Defendant's answer.
4. Waiver of jury.
5. Agreed statement of facts.
6. Supplemental agreed statement of facts.
7. Plaintiff's amended requests for findings of fact.
8. Plaintiff's requests for conclusions of law.
9. Plaintiff's motion for judgment.
10. Defendant's motion for judgment.
11. Judgment.

114 B. Law No. 7320:

1. Writ.
2. Plaintiff's declaration, omitting Exhibits A and B.
3. Defendant's answer.
4. Waiver of jury.
5. Agreed statement of facts.
6. Supplemental agreed statement of facts, omitting Exhibits A and B.
7. Plaintiff's amended requests for findings of fact.
8. Plaintiff's requests for conclusions of law.
9. Plaintiff's motion for judgment.
10. Defendant's motion for judgment.
11. Judgment.

C. Law No. 7321:

1. Writ.
2. Plaintiff's declaration, omitting Exhibits A and B.
3. Defendant's answer.
4. Waiver of jury.
5. Agreed statement of facts.
6. Supplemental agreed statement of facts, omitting Exhibits A and B.
7. Plaintiff's amended requests for findings of fact.
8. Plaintiff's requests for conclusions of law.
9. Plaintiff's motion for judgment.
10. Defendant's motion for judgment.
11. Judgment.

D. Law Nos. 7319, 7320, and 7321:

1. Transcript of record.
2. Defendant's requests for findings of fact and conclusions of law.
3. Opinion of the court.

115 4. Notice of appeal and defendants' motion to consolidate cases Nos. 7319, 7320, and 7321.

5. This stipulation.

J. DUKE SMITH,
Attorney for Plaintiff.
EDMUND J. BRANDON,
United States Attorney,
By C. KEEFE HUKLEY,
Assistant U. S. Attorney,
Attorney for Defendants.

[Clerk's certificate to foregoing transcript omitted in printing.]

116 [Memorandum: Orders of enlargement of time for docketing case to, and including, April 25, 1940, are here omitted. A. I. Charron, Clerk.]

In United States Circuit Court of Appeals, First Circuit

Minute entry of hearing

On October 9, 1940, this cause came on to be heard and was fully heard by the court, Honorable Calvert Magruder and Honorable John C. Mahoney, Circuit Judges, and Honorable John A. Peters, District Judge, sitting.

117 In United States Circuit Court of Appeals for the First Circuit

October Term, 1940

No. 3583

THOMAS W. WHITE, FORMER COLLECTOR, ET AL., DEFENDANTS APPELLANTS,

v.

WINCHESTER COUNTRY CLUB, PLAINTIFF, APPELLEE

Consolidated Appeal From the District Court of the United States for the District of Massachusetts

Before MAGRUDER, MAHONEY, and PETERS, JJ.

Opinion of the court

January 30, 1941

PETERS, J. This is a consolidated appeal from judgments in the aggregate amount of $9,211.25 entered for the plaintiff taxpayer in three suits in the United States District Court for the District of Massachusetts.

The question presented is whether certain payments made by members of the Winchester Country Club for so-called golf privileges and tennis privileges should be treated as "dues or membership fees" paid to a "social, athletic, or sporting club or organization" within the meaning of Sec. 413 of the Rev. Act of 1928.

The cases were tried by the District Judge without a jury upon agreed statements of fact and evidence adduced at the trial.

The Winchester Country Club is conceded to be such a club as is referred to in the statute.

118 The by-laws of the Club, from which pertinent quotations may be found in some detail in the opinion of the District Judge reported in 30 F. Supp. 142, provide that the annual dues of a member shall be $50.00, payment of which entitles him to "all the privileges of the Club except golf." Such a member desiring to obtain the privilege of playing golf, is enabled to do so by paying a fee, the amount of which depends upon the extent of the privilege desired. Upon payment of a fee of $50.00 he may have full golf privileges and play at any time during the year. For a fee of $35.00 he may have the privilege of playing except on certain specified days. A member is also permitted to purchase full house and tennis privileges and

limited golf privileges, as well as tennis privileges only, for members of his family.

A member who has acquired for himself either full or limited golf privileges may purchase full house and tennis privileges and limited golf privileges for members of his immediate family on payment of a smaller fee.

The by-laws define the words "full privileges," as used therein, as meaning all the privileges of the Club, and the words "limited privileges" as meaning unlimited house and tennis privileges and golf privileges except on Saturday afternoons, Sunday mornings, and holidays during April, May, June, September, October, and November.

The number of members of the Club is limited by the by-laws. The number having "limited privileges" is left to the determination of the board of directors which can deny the "privileges" to any person.

The practical interpretation and operation of the by-laws of the Club, which are somewhat obscure at first reading, were the subject of evidence and the District Judge found as follows:

"Members were permitted to engage privileges for either themselves or their families quite informally. The practice was merely to let the officers know in some way either in writing or orally what privileges were wanted. No action was ever taken by the Board of Directors approving or disapproving such action.

Privileges were dropped in the same informal manner,
119 and if privileges were taken or dropped in the middle of the year, suitable adjustments were made. Members were billed in March for dues and for privileges for the coming year. If no word had been received from a member as to the privileges desired, the same privileges as he had previously held were included on his bill, but he was quite at liberty to strike off such privileges as he did not want, and no attempt was made to collect for privileges thus dropped. On the other hand, by Article X of the by-laws, 'A member not resigning before the beginning of the Club year, shall be liable for the dues for that year.' The Club year began January first."

The Government's position is that members who paid the required annual dues of $50.00; members who purchased full golf privileges; and members who purchased limited golf privileges constituted different classes of membership, and that the amounts they paid for the privileges are to be considered "dues or membership fees" and taxable as such. The taxpayer concedes that the $50.00 paid annually by all members of the Club are "dues or membership fees", but denies that the payments for golf and tennis privileges and such privileges extended to families of

members represented such payment of fixed and definite charges applicable to all members of a particular class of membership (as it is put by the taxpayers) as would make them taxable as "dues or membership fees."

Of the total amount for which the taxpayer recovered judgment, $1,697.00 represents the tax upon the amounts paid for so-called "family limited privileges" which means "limited privileges" purchased by a member for his family.

The Government does not definitely claim that members who hold limited privileges for their families should be considered a separate class of membership, attorneys for the Government saying in their brief that whether members should be so regarded, "or whether the individual members of the family are considered associate members, the additional sums paid for 'family limited privileges' must be treated as dues or membership fees and not as incidental payments for use of the particular facility."

As a matter of fact there is no class of "associate members"
120 mentioned in the by-laws which were in force during the period in question.

The District Judge found as follows:

"Upon the agreed facts and all the other evidence, I find that the plaintiff had but one class of membership with the exception of a small class of special members, that neither possessors of golf privileges nor the holders of tennis privileges constituted a separate class of membership, that golf privileges and tennis privileges were optional with members and under the by-laws and the Club practice or policy could be acquired informally at any time, that once acquired there was no recurring obligation to take or pay for them in a succeeding year, that no formal action was required for surrendering such privileges during the year and that the fees therefor were not fixed or definite charges of any particular class of membership."

The question whether charges made by country clubs to their members for golf and similar privileges are to be classified as taxable "dues or membership fees" or nontaxable items of incidental expense, can seldom be determined by formulating a general self-applying definition of the statutory words. In many cases the line of demarkation is indistinct, and the decision turns upon the particular facts disclosed. If a payment clearly represents a fixed, recurring obligation automatically arising out of membership and extending over an indefinite time, it would hardly be contended that such payment should not be properly classified as a due or membership fee, as those words are ordinarily used and understood. If a payment has no such features and is for the limited or temporary use of a particular facility of the Club, it is admittedly not within that classification.

The statute carries no definition of "dues or membership fees" giving those words any special meaning. It does say that "the term 'dues' includes any assessment irrespective of the purpose for which made"; but that is not helpful here as the term "assessment" implies a demand upon a member for an additional sum of money which he is obliged to pay by the terms of his membership. The charges involved here, whatever they are called, are incurred at the option of the members.

121 That club charges, in order to be fairly classified as dues or membership fees as distinguished from casual charges, must have certain attributes, is clear. The meaning of the words as used in the statute has been the subject of discussion by several courts, first in the district of Massachusetts in 1925 (Weld v. Nichols, 9 F. (2d) 977), in which it was held that the words in question must refer to "definite obligations incidental to membership in the club," covering "only fixed and definite charges applicable to all members of each particular class of membership." This expression was adopted and the doctrine of the Weld case impliedly recognized by the court in Foran v. McLaughlin, 59 F. (2d) 158 (certiorari denied 287 U. S. 637), although, on different facts in that case, the payments were held to be dues because they represented such a fixed contractual liability.

The doctrine of the Weld case was followed in Baltimore Country Club v. United States, 7 F. Supp. 607, in which case it was held that annual golf fees exacted only from those members of the country club who desired the privilege of playing golf are not taxable as "club dues or membership fees"; and in Williamson v. United States, 12 F. Supp. 26, and Philadelphia Cricket Club v. United States, 30 F. Supp. 141.

In Hardt v. McLaughlin, 25 F. Supp. 684, a case decided against the taxpayer, on somewhat different facts, the principle was enunciated that "when a club member, in order to exercise certain privileges and use certain club facilities in connection with them, assumes a binding obligation to pay a fixed, definite charge, which obligation extends over a considerable period of time and will be automatically renewed until he withdraws from his preferred position as a user of the privileges in question (a 'recurring contractual obligation'), he really has become one of a particular class of club members."

In the Hardt case it appeared that the liability for golf fees was fixed in the same way as ordinary club dues, a "recurring contractual obligation." We find nothing in the instant case or in the decisions above referred to that requires us to dis-

122 turb the findings of the District Judge that there was but one class of membership in the plaintiff Club—with the exception of a small special class not involved. The temporary

nature of the privileges purchased by members, the fact that such privileges, different in kind, were optional, could be taken and dropped informally at pleasure and involved no recurring obligation to make further payments, are not attributes of a class of membership; but, on the other hand, indicate a limited, temporary use of particular facilities of the club, payment for which cannot be called "dues or membership fees" in the ordinary acceptation of those terms.

In support of their contention the appellants make an argument based upon the fact that the taxpayer, under its original by-laws as they stood before they were changed in 1929, would have been liable for these taxes as dues or membership fees. There is no allegation or evidence here of any improper attempt to avoid taxation. The reasons for the change in by-laws were given fully in the evidence before the District Court. Even if one motive behind the change was a desire to reduce the tax liability, it should not prejudice the taxpayer in asserting his legal rights. Gregory v. Helvering, 293 U. S. 465.

On the record before us we conclude that the findings of the District Judge and his conclusions that the amounts paid and in question were not taxable, under the circumstances shown, were correct, and the judgment of the District Court is affirmed.

The judgments of the District Court are affirmed.

123 In United States Circuit Court of Appeals

Judgment

January 30, 1941

This consolidated cause came on to be heard October 9, 1940, upon the transcript of record of the District Court of the United States for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, it is now, to wit, January 30, 1941, here ordered, adjudged, and decreed as follows: The judgments of the District Court are affirmed.

By the Court,

ARTHUR I. CHARRON, *Clerk.*

Recital as to issuance of mandate

Thereafter, to wit, on February 15, 1941, mandate issued to the District Court.

[Clerk's certificate to foregoing transcript omitted in printing.]

Order allowing certiorari.

Filed May 26, 1941

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Endorsement on cover:] File No. 45353. U. S. Circuit Court of Appeals, First Circuit. Term No. 63. Thomas W. White, et al., Former Collectors of Internal Revenue for the District of Massachusetts, Petitioners vs. Winchester Country Club. Petition for a writ of certiorari and exhibit thereto. Filed April 29, 1941. Term No. 63 O. T. 1941.

U. S. GOVERNMENT PRINTING OFFICE 1941